UNITED STATES DEPARTMENT OF LABOR • OFFICE OF ADMINISTRATIVE LAW JUDGES

Whistleblower Newsletter

May 4, 2004

	U.S. Department of Labor **Office of Administrative Law Judges** **800 K Street, NW, Suite 400-N** **Washington, DC 20001-8002** **(202) 693-7500** **www.oalj.dol.gov**	**John M. Vittone** **Chief Judge** **Thomas M. Burke** **Associate Chief Judge** **for** **Black Lung and** **Traditional**

Highlights of this issue

AIR21 Cases:

- Burden of proof and production in AIR21 cases; Title VII methodology [P 5]
  Peck v. Safe Air International, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004)

- Correction of clerical error in ALJ decision after request for ARB review filed [p 7]
  Negron v. Vieques Air Link, Inc., ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Jan. 8, 2004)

- Former employee [p 8]
  Peck v. Safe Air International, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004)

- Settlement; agreement is not voidable on the basis of lack of counsel or financial stress [p 12]
  Trechak v. American Airlines, Inc., ARB No. 03-141, ALJ No. 2003-AIR-5 (ALJ Mar. 19, 2004)

- Timeliness of complaint; equitable tolling; wrong forum - statutory foundation must be the same [p 13]
  Turgeau v. The Nordam Group, Inc., 2003-AIR-41 (ALJ Oct. 30, 2003); *Ferguson v. Boeing Co.*, 2004-AIR-5 (ALJ Apr. 5, 2004)

ERA Cases:

- Timeliness of complaint; continuing violation doctrine [p 14]
  Belt v. United States Enrichment Corp., ARB No. 02-117, ALJ No. 2001-ERA-19 (ARB Feb. 26, 2004)

- Timeliness of complaint; hostile work environment; timely event must be "component" of the alleged hostile work environment to extend filing period [p 15]
  Belt v. United States Enrichment Corp., ARB No. 02-117, ALJ No. 2001-ERA-19 (ARB Feb. 26, 2004

- Disqualification of ALJ; stock holdings; appropriate consultation with designated agency ethics official [p 16]
  Smalls v. South Carolina Electric & Gas, ARB No. 01-078, ALJ No. 2000-ERA-27 (ARB Feb. 27, 2004)

- Disqualification of counsel; dual representation [p 17]
  Turpin v. Lockheed Martin Corp., ARB No. 02-101, ALJ No. 2001-ERA-37 (ARB Jan. 29, 2004)

- Evidence; handwriting analysis; admissibility v. probative value [p 18]
  Overall v. Tennessee Valley Authority, 1999-ERA-25 (ALJ Mar. 16, 2004)

- Burden of proof; when clear and convincing evidence burden is invoked [p 19]
  Belt v. United States Enrichment Corp., ARB No. 02-117, ALJ No. 2001-ERA-19 (ARB Feb. 26, 2004)

- Owner of contract firm not a covered "employee" [p 21]
  Demski v. Indiana Michigan Power Co., ARB No. 02-084, ALJ No. 2001-ERA-36 (ARB Apr. 9, 2004)

Environmental Cases:

- Complainant's testimony about post-complaint activities; merely probing complainant's evidence is not equivalent to trial by consent [p 21]
  Sasse v. Office of the U.S. Attorney, USDOJ, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004)

- Protected activity; prosecutor's work prosecuting environmental crimes [p 24]
  Sasse v. Office of the U.S. Attorney, USDOJ, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004)

- Adverse employment action; rating of "excellent" rather than "outstanding" [p 25]
  Sasse v. Office of the U.S. Attorney, USDOJ, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004)

- Hostile work environment; general principles; heated work atmosphere inherent in nature of job [p 26]
  Sasse v. Office of the U.S. Attorney, USDOJ, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004)

- Employer; showing of control over the employment is required [p 27]
  Lewis v. Synagro Technologies, Inc., ARB No. 02-072, ALJ Nos. 2002-CAA-12 and 14 (ARB Feb. 27, 2004)

- Complainant placed on paid leave; if no showing of damages, complaint may be dismissed [p 28]
  Smith v. Western Sales & Testing, ARB No. 02-080, 2001-CAA-17 (ARB Mar. 31, 2004)

- Prosecutorial immunity; prosecutorial functions v. administrative functions [p 30]
  Sasse v. Office of the U.S. Attorney, USDOJ, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004)

- Waiver of attorney-client privilege [p 31]
  Willy v. The Coastal Corp., ARB No. 97-107, ALJ No. 1985-CAA-1 (ARB Feb. 27, 2004)

- Law of the case [p 32]
  Willy v. The Coastal Corp., ARB No. 97-107, ALJ No. 1985-CAA-1 (ARB Feb. 27, 2004)

STAA Cases:

- Attorney qualification proceeding [p 33]
  In re Slavin, 2004-MIS-2 and 2004-STA-12 (ALJ Mar. 31, 2004

- Formal rules of evidence, hearsay rule; application to STAA whistleblower hearings [p 35]
  Calmat Co. v. USDOL, No. 02-73199 (9th Cir. Apr. 19, 2004) (case below ARB No. 99-114, ALJ No. 1999-STA-15)

- Mixed-motive analysis; direct evidence of retaliation is not a prerequisite [p 36]
  Calmat Co. v. USDOL, No. 02-73199 (9th Cir. Apr. 19, 2004) (case below ARB No. 99-114, ALJ No. 1999-STA-15)

- Protected activity; refusal to log off duty time [p 36]
  Hardy v. Mail Contractors of America, ARB No. 03-007, ALJ No. 2002-STA-22 (ARB Jan. 30, 2004)

SOX Cases:

- Clear and convincing evidence burden on respondent; refusal of complaint to meet with audit committee investigators without his personal attorney [p 43]
  Welch v. Cardinal Bankshares Corp., 2003-SOX-15 (ALJ Jan. 28, 2004

- Covered employer; automatic exemption from reporting under section 15(d) where securities are held by fewer than 300 persons [p 44]
  Flake v. New World Pasta Co., ARB No. 03-126, ALJ No. 2003-SOX-18 (ARB Feb. 25, 2004)

- Employee of non-publicily traded subsidiary of publicly traded company [p 45]
  Morefield v. Exelon Services, Inc., 2004-SOX-2 (ALJ Jan. 28, 2004)

- Pretext; alleged insubordination set up as a pretext to discrimination [p 46]
  Welch v. Cardinal Bankshares Corp., 2003-SOX-15 (ALJ Jan. 28, 2004)

- Protected activity; reasonable belief that respondent violated the law; financials overstated income; restrictions on access of CFO to external auditors; untrained personnel making journal entries [p 48]
  Welch v. Cardinal Bankshares Corp., 2003-SOX-15 (ALJ Jan. 28, 2004)

- Protected activity; analyst's refusal to change stock rating; reference to SEC regulations [p 48]
  Getman v. Southwest Securities, Inc., 2003-SOX-8 (ALJ Feb. 2, 2004)

Immigration Case:

- Retaliation for cooperation with H-1B prevailing wage investigation [p 51]
  Talukdar v. U.S. Dept. of Veterans Affairs Medical & Regional Office Center, Fargo, ND, 2002-LCA-25 (ALJ Apr. 12, 2004)

PSI Cases:

- *Procedures for the Handling of Discrimination Complaints under Section 6 of the Pipeline Safety Improvement Act of 2002*, Interim Final Rule, 69 Fed. Reg. 17587 (Apr. 5, 2004) [p 53]

Miscellaneous:

- Adverse employment action; requirement of a materially adverse change in terms of employment [p 53]
  White v. Burlington Northern & Santa Fe Railway Co., 2004 Fed. App. 0101P (6th Cir. Apr. 14, 2004) (Title VII case)

AIR21 CASES

ARB REVIEW; MOTION FOR SUMMARY REVERSAL

In ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 04-035, ALJ No. 2003-AIR-12 (ARB Mar. 31, 2004), the ARB denied the Complainant's motion for summary reversal of the ALJ's recommended decision, where, although it was clear that the Complainant disagreed with the ALJ's recommendation, she failed to establish that the ALJ's decision was so obviously incorrect that further briefing would not benefit the Board. The ARB also denied the Complainant's motion for default judgment on her motion for summary reversal because the Respondent had not responded to her motion. The ARB stated that it would have sought the Respondent's position if it thought it would have been helpful, but that in the instant case it had not been necessary to request a response. The Board observed in this regard that it had not adopted as Board procedure either 29 C.F.R. § 18.6(a), 18.5(b) or FRCP 3-7, 10-12, and 55.

BURDEN OF PROOF AND PRODUCTION IN AIR21 CASES; TITLE VII METHODOLOGY

In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the ARB outlined the scope of coverage, procedures, and burdens of proof under the AIR21 whistleblower provision. The Board emphasized that the law imposes a "gatekeeper" standard prior to hearing during the preliminary stage of the proceeding -- the required "prima face showing" of section 42121(b)(2)(B)(i). The standard that ALJs apply at hearing and that the ARB applies on review, however, is as follows: "If a complainant 'demonstrates,'i.e., proves by a preponderance of the evidence, that protected activity was a 'contributing factor' that motivated a respondent to take adverse action against him, then the complainant has established a violation of AIR21 section 519(a). 49 U.S.C.A. § 42121(b)(2)(B)(iii)." (citation omitted). The Board wrote that

> The distinction, then, between standards applied for purposes of investigation and adjudication of a complaint concerns the complainant's burden: To secure investigation a complainant merely must raise an inference of unlawful discrimination; to prevail in an adjudication a complainant must prove unlawful discrimination.

The ARB also observed that the AIR21 whistleblower provision was modeled on section 211 of the ERA, and that the ARB had found in *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5-8 and nn.12-19 (ARB Sept. 30, 2003), that the Title VII methodology for analyzing and discussing evidentiary burdens of proof was appropriate to use in ERA section 211 cases. The ARB, quoting its decision in *Kester*, wrote:

> "[T]he Title VII burden shifting pretext framework [is] warranted in [the] typical [ERA] whistleblower case where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence." *Id*. at 7 n.17. The ARB may thus examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant in an ERA case has

> proved by a preponderance of the evidence that protected activity contributed to the dismissal. *Id. See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Unless a complainant proves that the employer fired him in part because of his protected activity, it is unnecessary to proceed to determine whether the employer has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Kester*, slip op. at 8.

The Board then held that the same approach is applicable under AIR21 section 519. *See* 49 U.S.C.A. § 42121(b)(2)(B)(iii)-(iv).

COMPLAINT WHICH WAS ALLEGEDLY FRIVOLOUS OR BROUGHT IN BAD FAITH; REQUEST FOR ATTORNEYS' FEES

In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the Respondent requested that it be awarded attorney's fees. The Board noted that if a complaint brought under AIR21 section 519 is found to be frivolous or brought in bad faith, it could "'award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.' 49 U.S.C.A. § 42121(b)(3)(C). *See* 29 C.F.R. § 1979.109(b) (ALJ award); 29 C.F.R. § 1979.110(e) (ARB award)." The ARB declined to award such fees, quoting the ALJ's findings that the Complainant had maintained "a firm and sincere belief that he had been the victim of a retaliatory termination" thereby precluding a finding of bad faith, that Peck's conclusion as to coverage "was understandable and not frivolous," and that the circumstances surrounding the discrimination complaint, including the temporal proximity between protected activity and unfavorable personnel action, prevented the complaint from being characterized as frivolous.

See also ***Kinser v. Mesaba Aviation, Inc.***, 2003-AIR-7 (ALJ Feb. 9, 2004) (ALJ declined to award fees where Complainant was " understandably suspicious about the motivations behind the adverse employment actions he suffered," and had established temporal proximity, but ultimately was not successful in confirming his suspicions; discussion of meaning of "frivolous" and "meritless").

CONTRIBUTING FACTOR; CIRCUMSTANTIAL EVIDENCE STANDING ALONE MAY NOT BE SUFFICIENT PROOF TO INVOKE RESPONDENT'S CLEARN AND CONVINCING BURDEN OF PROOF WHERE IT ARTICULATES A LEGITIMATE NON-DISCRIMATORY REASON AND THE COMPLAINANT DOES NOT SHOW THAT REASON TO BE PRETEXTUAL

Under the whistleblower provision of AIR21, the complainant must prove by a preponderance of the evidence, that protected activity was a contributing factor that motivated the respondent to take adverse action against him. In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the ARB indicated that even though temporal proximity between the protected activity and the adverse employment action circumstantially creates an inference of a violation of the Act, such may not be sufficient to prove the case. The ARB indicated that if the Respondent establishes that the adverse action was taken for legitimate, nondiscriminatory reasons alone, and the Complainant does not establish that such reasons were pretextual, the Complainant may be found to have failed to show that

his protected activity was a contributing factor in the adverse employment decision. If so, it is unnecessary to proceed to the next stage of proof (whether the Respondent demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity). In other words: " It is not necessary for the Respondent to produce clear and convincing evidence of a legitimate non-discriminatory reason to rebut the Complainant's prima facie case. .... That heightened burden of proof does not come into play until the Complainant has demonstrated that protected activity was a contributing factor in the termination, see 49 U.S.C.A. § 42121(b)(2)(B)(iii)-(iv) . . . ."

CORRECTION OF CLERICAL ERROR IN ALJ DECISION AFTER REQUEST FOR ARB REVIEW ALREADY FILED; APPLICABILITY OF FRCP 60(a)

In ***Negron v. Vieques Air Link, Inc.***, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Jan. 8, 2004), the ARB addressed how an ALJ may correct a mistake in an initial decision. In *Negron*, the "Remedies" section of the ALJ decision had included a finding that the Complainant was entitled to a $10,000 award of compensatory damages, but in the Order section directed that the Respondent pay the Complainant $50,000 in compensatory damages. The Respondent filed a petition for review with the ARB, which issued a Notice of Appeal and Order Establishing Briefing Schedule. The same day as the ARB's Notice, the ALJ issued three documents: a motion for leave to correct clerical error, an erratum, and a corrected Decision and Order. In the Motion, the ALJ requested that the Board permit him to correct the clerical error under the authority of FRCP 60(a). The ALJ averred that, due to clerical oversight, the Remedies section should have stated that the Complainant was entitled to $50,000 in compensatory damages. In addition, the ALJ requested that he be permitted to insert additional text following the corrected sentence to replace text in the original decision. The Respondent objected.

The ARB held that FRCP 60(a) was applicable. It then stated that to determine whether FRCP 60(a) permits correction, the Board had to "determine whether the correction is intended to conform the order to reflect the intent of the ALJ when he entered the original order or whether the correction has been requested in an attempt to correct a factual or legal error in the original decision. *American Fed'n of Grain Millers v. Cargill, Inc.*, 15 F.3d 726, 728 (7th Cir. 1994)." The Board cited *Blanton v. Anzalone*, 813 F.2d 1574, 1577 n.2 (1987) to the effect that "blunders in execution" can be corrected, whereas "changes in mind" cannot.

The ARB held that the ALJ erred by issuing the motion, the erratum and the corrected decision simultaneously, indicating that he should have first filed the motion for leave to correct and permitted the ARB to rule. The Board, however, found the error harmless because under the circumstances it would have remanded the case. The Board noted that the latitude to correct clerical errors is very wide; that the ALJ had unequivocally stated that the $10,000 figure was in error, which was supported by the fact that the Order directed the payment of $50,000. Although the Board indicated that it would have liked a fuller explanation, it had absolutely no basis for disbelieving the ALJ's assertion of clerical error. The Board took into account that the ALJ had acted expeditiously and that it reviews ALJ's legal conclusions de novo. Thus, the Board granted the ALJ's motion to correct error, and recognized the ALJ's corrected decision as the decision on appeal.

EMPLOYEE COVERAGE; FORMER EMPLOYEE

In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the Complainant had once been employed by the Respondent as its Director of Maintenance, but by the time of his protected activity had a relationship with the Respondent where he continued to perform maintenance work for the employer, but no longer on a salary basis. Rather, the Complainant -- who also owned and operated a business servicing and maintaining aircraft for other airlines -- started performing labor in exchange for hanger space. Applying the *Darden* and *Reid* tests for delineating employment relationships, the ARB found, essentially, that substantial evidence supported the ALJ's finding that the relationship between the Complainant and the Respondent was not as employer-employee at the time the Complainant's services were terminated. However, the ARB noted that when the ALJ issued his recommended decision, DOL had not yet promulgated AIR21 regulations. When those regulations were published, they defined the term "employee" at 29 C.F.R. § 1979.101 as "an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier." In other words, under the AIR21 regulations "[c]overage . . . could extend, depending on the surrounding factual circumstances, to former and current employees of air carriers and their contractors and subcontractors, applicants for employment by these entities, and individuals whose employment could be affected by these entities."

The ARB observed that the relationship between the parties in the instant case was not amenable to ready demarcation, and because of uncertainty regarding the application of section 1979.101, it would assume, without deciding, that the Complainant was an employee covered by the AIR21 whistleblower provision. Rather, the ARB decided the case based on its finding that the Complainant had failed to prove that the managers who decided to terminate his services knew about his protected activity, and had failed to prove that his protected activity was a contributing factor in his discharge.

KNOWLEDGE OF PROTECTED ACTIVITY; COINCIDENCES AND INFERENCES ALONE DO NOT CARRY COMPLAINANT'S BURDEN OF PROOF

In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the ARB stated that an element of an AIR21 whistleblower case is that the employer knew about the protected activity. The Board wrote:

> Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. *Bartlik v. TVA,* 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd,* 73 F.3d 100 (6th Cir. 1996) (ERA employee protection provision). This element derives from the language of the statutory prohibitions, in this case that no air carrier, contractor, or subcontractor may discriminate in employment "because" the employee has engaged in protected activity. 49 U.S.C.A. § 42121 (a). Section 519 provides expressly that the element of employer knowledge applies even to circumstances in which an employee "is

> about to" provide, or cause to be provided, information about air carrier safety or "is about to" file, or cause to be filed, such proceedings. 49 U.S.C.A. § 42121(a)(1) and (2); H.R. Conf. Rep. No. 106-513, at 216-217 (2000), *reprinted in* 2000 U.S.C.C.A.N. 80, 153-154 (prohibition against taking adverse action against an employee who provided or is about to provide (with any knowledge of the employer) any safety information).

The ARB noted that the ALJ had found that, although circumstantial evidence pointed toward a case of unlawful discrimination under AIR21, contravening evidence undermined the circumstantial evidence case. The ARB found that substantial evidence supported the ALJ's conclusion that the managers who terminated the Complainant's services did not know about his protected activity. Thus, where the Complainant's proof consisted merely of coincidental timing and inferences, but there was uncontroverted testimony of the lack of employer knowledge, the Complainant failed to meet his burden of establishing by a preponderance of the evidence that the relevant decision makers knew about his FAA complaint.

POST-COMPLAINT ADVERSE EMPLOYMENT ACTIONS; LITIGATION BY EXPRESS OR IMPLIED CONSENT

In ***Kinser v. Mesaba Aviation, Inc.***, 2003-AIR-7 (ALJ Feb. 9, 2004), the Complainant presented evidence on the contention that he suffered retaliatory adverse employment actions in the months following the filing of his AIR21 complaint. The Complainant had not amended his complaint and the newly raised events had not been investigated by OSHA. The Respondent objected. The ALJ held that:

> An administrative law judge may decide an issue raised by express or implied consent and fairly, fully litigated on the merits even though that issue was not contained in the pleadings. 29 C.F.R. § 18.43(c) (2003); *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992). The record must show that the parties "understood the evidence to be aimed at the unpleaded issue." *Yellow Freight*, 954 F.2d at 358.
>
> These alleged retaliatory actions took place in October of 2002, almost two months after the complaint was filed. The parties thoroughly explored these events at the hearing and the record contains documentary evidence regarding the events. Respondent took the opportunity to question its own witnesses and cross-examine Complainant's witnesses about these events. Respondent's questions to the witnesses about these events reveal an understanding that these events would be included in the claim. By including these events, Complainant does not seek to introduce a new theory into this case. The parties fairly and fully litigated the issues arising from the events of October of 2002, and they will be treated as if Complainant had included them in his original complaint.

[Editor's note: *But see* ***Sasse v. Office of the U.S. Attorney, USDOJ***, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004) (merely probing Complainant's evidence does not establish trial by consent).]

PRO SE COMPLAINANTS; ADJUDICATIVE LATITUDE; ADEQUATE OPPORTUNITY TO TESTIFY

In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the Complainant alleged before the ARB that the ALJ had prevented him from testifying. The ARB first described an ALJ's and the ARB's obligations toward a pro se litigant:

> We construe complaints and papers filed by pro se complainants "liberally in deference to their lack of training in the law" and with a degree of adjudicative latitude. *Young v. Schlumberger Oil Field Serv.,* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), *citing Hughes v. Rowe,* 449 U.S. 5 (1980). At the same time we are charged with a duty to remain impartial; we must "refrain from becoming an advocate for the pro se litigant." *Id.* We recognize that while adjudicators must accord a pro se complainant "fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance." *Griffith v. Wackenhut Corp.,* ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), *quoting Dozier v. Ford Motor Co.,* 702 F.2d 1189, 1194 (D.C. Cir. 1983). Affording a pro se complainant undue assistance in developing a record would compromise the role of the adjudicator in the adversary system. *See Young v. Schlumberger Oil Field Serv.,* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 9, *citing* Jessica Case, Note: *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law and Excuse?*, 90 KY. L. J. 701 (2002). We accordingly have scrutinized the ALJ's treatment of the parties, mindful of the balance properly maintained between accommodation and evenhanded administration.

The ARB then analyzed whether the ALJ provided the Complainant with a meaningful opportunity to testify and otherwise to present his complaint, and found that the ALJ had accorded the Complainant such an opportunity. The Board wrote: "Whether the ALJ's recommendation would have been better informed had Peck testified is not at issue. Peck did not testify despite having had the opportunity to do so, and the record for consideration is the one before us."

PROTECTED ACTIVITY; PENDING FAA REGULATION

In ***Weil v. Planet Airways, Inc.***, 2003-AIR-18 (ALJ Mar. 16, 2004), the ALJ found that the Complainant engaged in protected activity when he forcefully advocated for implementation of the Advanced Passenger Information System (APIS) imposed after September 11 to obtain and monitor information about people entering the United States. The ALJ found that a protected activity under AIR21 has three components: "First, the report or action must involve a purported violation of a Federal law or FAA regulation, standard or order relating to air carrier safety and at least 'touch on' air

carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complainant must communicate his safety concern to either his employer or the Federal Government (49 U.S.C. § 42121 (a) (1))."

At the time the Complainant engaged in his advocacy on APIS, the FAA had only announced the intention to implement such a system. The ALJ, however, found that an APIS rule was "imminent" and that given that whistleblower laws are to be given a broad interpretation, found that the Complainant met the first component of protected activity under AIR21. The ALJ found that the Complainant had a reasonable concern that the Respondent would not meet the APIS compliance deadline, and that he had clearly communicated that concern to Respondent's management. The Complainant, however, was ultimately found by the ALJ not to be entitled to relief under the AIR21 whistleblower provision because he was unable to prove that his protected activity contributed to his termination from employment.

PROTECTED ACTIVITY; MUST BE SPECIFIC IN RELATION TO GIVEN PRACTICE, CONDITION, DIRECTIVE OR EVENT; COMPLAINANT MUST REASONABLY BELIEVE IN EXISTENCE OF VIOLATION

In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the ARB described protected activity under the whistleblower provision of AIR21 as follows:

> Air carriers are prohibited under AIR21 section 519 from discharging or otherwise discriminating against any employee because the employee, inter alia, provided the employer or Federal Government with information "relating to any violation or alleged violation of any order, regulation, or standard of the [FAA] or any other provision of Federal law relating to air carrier safety . . . ." 49 U.S.C.A. § 42121(a). While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of a violation. *Clean Harbors Envtl. Serv. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998); *Leach v. Basin 3Western, Inc.*, ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003).

PROTECTED ACTIVITY; PERFORMING DUTIES AS A QUALITY CONTROL INSPECTOR INHERENTLY INVOLVE PROTECTED ACTIVITY

In ***Kinser v. Mesaba Aviation, Inc.***, 2003-AIR-7 (ALJ Feb. 9, 2004), the Respondent maintained that the Complainant's reporting of damaged and missing bin latch shrouds did not constitute protected activity because such did not implicate safety. The ALJ agreed that the record tended to show that broken or missing shrouds did not implicate a serious safety concern, but nonetheless found the Complainant, as a quality control inspector, was engaged in protected activity when he reported the damaged or missing bin latch shrouds, citing *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984) and *Richter v. Baldwin Associates*, 1984-ERA-9 (Sec'y Mar. 12, 1986), and FAA regulations imposing a duty on inspectors to report such discrepancies.

PROTECTED ACTIVITY; WORK REFUSAL; REASONABLE BELIEF THAT WORK ASKED TO BE PERFORMED WOULD VIOLATE FAA REGULATIONS OR QUALITY CONTROL PROCEDURES

In ***Kinser v. Mesaba Aviation, Inc.***, 2003-AIR-7 (ALJ Feb. 9, 2004), the Complainant alleged that his refusals to sign off on several C-checks were protected activity. The ALJ observed that AIR21 does not specifically list a refusal as protected activity, whereas section 5851 of the ERA does. The ALJ found, however, that caselaw in existence prior to the amendment of the ERA to expressly include work refusals as protected activity nonetheless categorized refusals as such. *Durham v. Georgia Power Co.*, 1986-ERA-9 (ALJ Oct. 24, 1986). Thus, the ALJ found that if the Complainant's "refusal was based on a reasonable belief that he was being asked to violate FAA regulations and quality control procedures by signing off on the C-check, his actions could represent instituting proceedings under AIR21." The ALJ, however, ultimately found that the Complainant did not have a reasonable belief that signing off on the checks would violate the law, and therefore there refusals were not protected activity.

PROTECTED ACTIVITY; FILING A WHISTLEBLOWER COMPLAINT

Filing a complaint or charge of employer retaliation because of safety and quality control activities is protected activity under 49 U.S.C. § 42121(a)(1)-(4) (2002). ***Kinser v. Mesaba Aviation, Inc.***, 2003-AIR-7 (ALJ Feb. 9, 2004).

SETTLEMENT; AGREEMENT IS NOT VOIDABLE ON THE BASIS OF LACK OF COUNSEL OR FINANCIAL STRESS

In ***Trechak v. American Airlines, Inc.***, ARB No. 03-141, ALJ No. 2003-AIR-5 (ALJ Mar. 19, 2004), the Complainant argued that she should be permitted to be released from a settlement agreement because she signed the agreement against her better judgment when she and her family were ill and desperately in need of money, because she did not have counsel at the time of the settlement during a workers' compensation hearing, and because the Respondent had acted unreasonably in denying her request for 24 hours to think about the offer and get advice.

The ARB noted that it had held in *Beliveau v. Naval Undersea Warfare Ctr.*, ARB No. 99-070, ALJ No. 1997-SDW-6 (ARB June 30, 1999), that "an opposing party's improper conduct may render a settlement agreement voidable,"but had not addressed the specific question whether economic stress and/or lack of counsel can be grounds for voiding a settlement agreement. The Board ruled that "neither lack of counsel, nor financial stress, nor the combination of the two, can be grounds for voiding a settlement agreement. Were it otherwise, employers would have no reason to settle with employees in financial straits or employees acting pro se." The Board also found that the circumstances did not establish that the Respondent's refusal to allow 24 hours to consider the offer to be an unfair manipulation. Rather, the settlement was offered to avoid putting on witnesses on the day of the offer. In addition, the Complainant did not challenge the Respondent's claim that she accepted the offer with the assistance of the workers' compensation court's Administrative Officer, and did not indicate that she was misled by the Respondent as to the terms of the agreement.

TIMELINESS OF COMPLAINT; CONTINUING VIOLATIONS STANDARD FOR INCLUSION OF EVENTS OUTSIDE LIMITATIONS PERIOD; EVIDENTIARY VALUE OF EVENTS THAT ARE NOT ACTIONABLE BECAUSE THEY WERE NOT THE SUBJECT OF A TIMELY COMPLAINT

In ***Kinser v. Mesaba Aviation, Inc.***, 2003-AIR-7 (ALJ Feb. 9, 2004), the ALJ found that the continuing violations standard stated in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) was applicable for considering whether events outside the limitations period may be considered as timely raised in an AIR21 whistleblower complaint. Applying this standard, the ALJ found that events pleaded by the Complainant that occurred outside the 90 day limitations period were not actionable, as they each were isolated and disconnected events. The ALJ, however, held that those events contributed to the complete picture of the working relationship between the Complainant and his immediate supervisor, and therefore was relevant evidence pertaining to the timely-filed claims.

TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; WRONG FORUM

In ***Turgeau v. The Nordam Group, Inc.***, 2003-AIR-41 (ALJ Oct. 30, 2003), the Complainant filed a retaliatory termination petition in Oklahoma state court, which the Respondent successfully removed to federal district court. The District Court thereafter granted the Respondent's motion to dismiss on the ground that AIR21 preempted the Complainant's original state law cause of action. Shortly thereafter the Complainant filed an AIR21 complaint with OSHA. Although the original state complaint had been filed within 90 days after the Complainant's discharge by the Respondent, almost 6 months had passed before the AIR21 complaint was filed with OSHA. Accordingly, the Respondent filed a motion for summary decision based on lack of timeliness.

In defense, the Complainant relied on the "precise statutory claim in the wrong forum" ground for equitable tolling. *See Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981). The ALJ observed that the wrong forum equitable tolling standard has two corollaries: (1) that the claim filed in the wrong forum must have been filed within the time limits that would have applied had the complaint been filed in the correct forum, and (2) that the plaintiff must have used the same statutory foundation when filing both the original claim and the subsequently filed claim. In the instant case, the Complainant's filing in State court was well within the AIR21 90 day limitations period. In regard to the second corollary, the Complainant proffered that his AIR21 complaint is identical to the retaliatory termination complaint he filed in State court, both contending that he was fired by the Respondent because he reported violations of FAA requirements. The ALJ, however, found that the relevant case law "holds that more than the underlying facts must be identical. Rather, both claims must have been made under the same statute." The ALJ noted that the ARB had ruled on this very issue in *Tierney v. Sun-Re Cheese, Inc.*, ARB No. 00-052, ALJ No. 2000-STA-12 (ARB Mar. 22, 2001). Because the original complaint was based on Oklahoma law and not AIR21, the "wrong forum" equitable tolling defense failed. The Complainant noted that another ALJ had ruled differently in *Ford v. Northwest Airlines, Inc.*, 2002-AIR-21 (ALJ Oct. 18, 2002), but the ALJ respectfully disagreed with that decision.

Similarly, in ***Ferguson v. Boeing Co.***, 2004-AIR-5 (ALJ Apr. 5, 2004), the Complainant had filed a complaint with the Department of Defense OIG. When the Complainant later pursued his complaint with OSHA, the Deputy Regional Administrator applied the wrong forum equitable estoppel principle to find that the complaint was timely filed. The ALJ found:

> [T]he Deputy Regional Administrator applied the third condition for collateral estoppel incorrectly. Among other things, he failed to consider that the initial complaint must have been filed in the wrong forum for equitable estoppel to be applicable. But the May 8, 2002 complaint was not filed in the wrong forum. Rather, the DoD IG was a proper forum for the complaint of retaliation due to whistleblowing, as the DoD IG took jurisdiction over the case and recently issued a decision denying the claim .... This is not a case where a complaint was filed in a forum where it was dismissed for lack of jurisdiction or improper venue. Instead, the complainant has had his claim adjudicated on the merits, and it was determined by the DoD IG that the complainant was disciplined for engaging in misconduct and violating Boeing's Expected Code of Conduct for its employees ..., not for the complaints he made regarding his supervisor's actions. Since the initial complaint was filed in a proper forum, equitable estoppel is inapplicable. Therefore, the complaint filed with OSHA was untimely, and this case must be dismissed.

ERA CASES

[Nuclear & Environmental Whistleblower Digest II B 2 a]
TIMELINESS OF COMPLAINT; NOTICE OF REDUCTION IN FORCE

Where the alleged adverse action is a reduction in force, the discriminatory act is the employer's communicating notice of the reduction in force to the employee as opposed to the last date of employment. ***Belt v. United States Enrichment Corp.***, ARB No. 02-117, ALJ No. 2001-ERA-19 (ARB Feb. 26, 2004). In ***Belt***, the Complainant signed a memorandum that gave final and unequivocal notice that the Complainant would be discharged under an involuntary reduction in force. The Board held that the fact that the memorandum did not set a date for actual termination did not change the finality of the action.

[Nuclear & Environmental Whistleblower Digest III C 1]
TIMELINESS OF COMPLAINT; CONTINUING VIOLATION DOCTRINE

In ***Belt v. United States Enrichment Corp.***, ARB No. 02-117, ALJ No. 2001-ERA-19 (ARB Feb. 26, 2004), the Complainant had received final and unequivocal notice that he would be discharged under an involuntary reduction in force, and had not filed his ERA whistleblower complaint within 180 days of that event. The Complainant argued that the continuing violation doctrine applied to equitably toll the filing period. The ARB found that only two discrete acts occurred within 180 days

before the complaint was filed -- the signing of retirement papers by the Complainant and the benefits plan manager at Respondent's resource center -- and the signing of an exit questionnaire by the Respondent's employment manager during the course of the Complainant's exit interview. Neither document demonstrated discriminatory or retaliatory motive on the part of the Respondent. The Board held that: "Rather, both documents resulted from the alleged adverse action ... when [the Respondent] notified [the Complainant] that his request to be riffed had been accepted." These discrete acts "were not adverse actions but rather the logical effects of [the Respondent] notifying [the Complainant] of the involuntary RIF...." The Board held that "[b]ecause the date on which the mere effects of a discrete act occurred is not relevant to the issue of timeliness, and no discriminatory act occurred within 180 days prior to the date [the Complainant] filed his complaint..., we hold that [the Complainant's] reliance on the so-called continuing violation theory fails." Slip op. at 14-15 (citations omitted).

[Nuclear & Environmental Whistleblower Digest III C 4]
TIMELINESS OF COMPLAINT; HOSTILE WORK ENVIRONMENT; TIMELY EVENT MUST BE "COMPONENT" OF THE ALLEGED HOSTILE WORK ENVIRONMENT TO EXTEND FILING PERIOD

In ***Belt v. United States Enrichment Corp.***, ARB No. 02-117, ALJ No. 2001-ERA-19 (ARB Feb. 26, 2004), the ALJ had accepted the Complainant's argument that, although he did not timely file a complaint with 180 days of the notice of his RIF, under *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the existence of a hostile work environment meant that his claim would be timely if the claim was part of the same unlawful practice and at least one act fell within the filing period (in the case *sub judice*, the date the Complainant was actually terminated). The ARB held that the ALJ misapplied *Morgan*.

First, the Board made findings indicating the absence of a hostile work environment. Although the Complainant presented an NRC letter raising generalized concerns about a "chilled environment" at the facility at which the Complainant worked, the NRC letter did not refer specifically to the Complainant or the department in which he worked, nor did it mention harassment or hostility or indicate an abusive atmosphere. The ARB found evidence that the Complainant actually worked in a supportive rather than a hostile environment; and that although Complainant had a less than ideal working relationship with a supervisor, he himself admitted that the relationship was professional.

Finally, the Board observed that, even if the record had demonstrated a hostile work environment, at least one of the acts comprising such an environment must have occurred less than 180 days before the date the complaint was filed. The Board held that the dates of the actual discharge and exit interview (as opposed to the date that notification of the RIF) were not "components" of the alleged hostile work environment.

[Nuclear & Environmental Whistleblower Digest VII D 1]
DATE OF HEARING; ACCOMMODATION OF RESPONDENTS' COUNSEL'S SCHEDULE

In ***Turpin v. Lockheed Martin Corp.***, ARB No. 02-101, ALJ No. 2001-ERA-37 (ARB Jan. 29, 2004), Complainant argued that the ALJ erred by deferring the scheduling of the hearing to accommodate Respondent's counsel's schedule, thereby denying Complainant a speedy trial. The ALJ had, in a November 2001 telephonic conference, scheduled the hearing for March 2002 because of Respondents' counsel's schedule. The ARB found that Complainant had failed to establish that this constituted error by the ALJ.

[Nuclear & Environmental Whistleblower Digest VIII A 5]
DISQUALIFICATION OF ALJ; STOCK HOLDINGS; APPROPRIATE CONSULTATION WITH DESIGNATED AGENCY ETHICS OFFICIAL

In ***Smalls v. South Carolina Electric & Gas***, ARB No. 01-078, ALJ No. 2000-ERA-27 (ARB Feb. 27, 2004), the ALJ became aware at the close of the first day of a two-day hearing that he owned stock in the Respondent's parent company when a document was admitted into evidence bearing the logo of the parent company. The ALJ disclosed the circumstance to the parties, which both stated that they had no objection to the ALJ continuing to preside over the hearing and deciding the case. On review, however, the ARB became concerned because the record did not indicate the value of the stock or other information relevant to the ethics regulations at 5 C.F.R. Part 2635. Thus, the Board had its General Counsel make inquiries. In response, the ALJ provided e-mail documentation that he had consulted with the appropriate Designated Agency Ethics Official, who had advised that the circumstances did not require the ALJ's recusal. Noting that the parties had been served with the ARB's inquiry and the ALJ's response and had not raised an objection, and citing 5 C.F.R. § 2635.107(b) (providing that disciplinary action for ethics regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official), the ARB found it unnecessary to address the issue further.

[Nuclear & Environmental Whistleblower Digest VIII B 3]
INTERLOCUTORY APPEAL; COMPLAINANT'S FAILURE TO SERVE RESPONDENT WITH REQUEST FOR HEARING

In *Hibler v. Exelon Nuclear Generating Co., LLC*, 2003-ERA-9 (ALJ May 5, 2003), the ALJ had declined to dismiss a hearing request that, although timely filed with OALJ, was not filed on the Respondent by the pro se Complainant. In *Hibler v. Exelon Nuclear Generating Co.*, LLC, 2003-ERA-9 (ALJ June 4, 2003), the ALJ granted the Respondent's motion to certify the case to the ARB as an interlocutory appeal. In ***Hibler v. Exelon Generation Co., LLC***, ARB No. 03-106, ALJ No. 2003-ERA-9 (ARB Feb. 26, 2004), the ARB denied an interlocutory appeal, observing that the Board had decided a case directly on point -- *Shelton v. Oak Ridge Nat'l Lab.*, ARB No.98-100, ALJ No. 1995-CAA-19 (ARB June 22, 1998) (denying interlocutory appeal;. complainant could raise any arguments concerning the timeliness of the respondent's request for hearing in her brief challenging the ALJ's recommended decision) and *Shelton v. Oak Ridge Nat'l Lab.*, ARB No.98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001) (time limit for filing a request for a hearing is subject to equitable tolling).

[Nuclear & Environmental Whistleblower Digest IX M 2]
ATTORNEY QUALIFICATION PROCEEDING

See ***In re Slavin***, 2004-MIS-2 and 2004-STA-12 (ALJ Mar. 31, 2004), casenoted in STAA Digest II M regarding the procedures for conducting a 29 C.F.R. § 18.34(g) hearing to determine the qualifications of an attorney.

[Nuclear & Environmental Whistleblower Digest IX M 2]
DISQUALIFICATION OF COUNSEL; DUAL REPRESENTATION OF RESPONDENTS NOT SHOWN TO BE PREJUDICIAL TO COMPLAINANT

In *Turpin v. Lockheed Martin Corp.*, 2001-ERA-37 (ALJ Nov. 29, 2001), Complainant moved to disqualify a law firm and the General Counsel of a successor contractor from representing both the former contractor and the successor contractor of the Department of Energy facility where Complainant was formerly employed. In ***Turpin v. Lockheed Martin Corp.***, ARB No. 02-101, ALJ No. 2001-ERA-37 (ARB Jan. 29, 2004), the ARB affirmed the ALJ's dismissal of the motion, quoting the ALJ's finding: "Complainant has not shown how he will be prejudiced if both Respondents have the same counsel, and I can find no justification for disqualifying counsel from representing two defendants in a proceeding such as the present case."

[Nuclear & Environmental Whistleblower Digest X D]
ANALYTICAL APPROACH; ARB ASSUMES (BUT NOT DECIDES) THAT CERTAIN ELEMENTS OF WHISTLEBLOWER COMPLAINT WERE ESTABLISHED WHERE CASE MAY BE DISPOSED OF UPON FAILURE TO ESTABLISH ONE ELEMENT OF THE CAUSE OF ACTION

In ***Smalls v. South Carolina Electric & Gas***, ARB No. 01-078, ALJ No. 2000-ERA-27 (ARB Feb. 27, 2004), the ARB approached the decision on the merits as follows:

> The record contains ample evidence, which, if fully credited, could establish three of the four elements necessary for Smalls to carry his burden in this whistleblower complaint – protected activity, the employer's knowledge of protected activity, and adverse action. .... Because we dispose of this complaint based on Smalls' failure to establish that protected activity was a contributing factor in SCE&G's decision to rate Smalls' performance "below expectations," we will assume but not decide that when Smalls raised concerns about the design, installation, and testing of the SIMPLEX system, he engaged in protected activity. Furthermore, we assume without finding that this protected activity was known to the decision-makers involved in Smalls' "below expectations" rating, and that such a rating constitutes adverse action. Specifically, we will limit our analysis to the issue of whether Smalls established that this protected activity contributed to his "below expectations" performance rating for the period ending December 1, 1999.

[Nuclear & Environmental Whistleblower Digest X P]
ANALYSIS; PERMISSIBLE TO ASSUME, WITHOUT DECIDING, ELEMENTS OF THE CAUSE OF ACTION WHERE THE COMPLAINT FAILS ON ANOTHER ELEMENT

In ***Pafford v. Duke Energy Corp.***, ARB No. 02-104, ALJ No. 2001-ERA-28 (ARB Jan. 30, 2004), the ARB assumed, without deciding, that Complainants had engaged in protected activity. It was not necessary to reach the protected activity element of the case because the Complainants had failed to establish that Respondent's proffered reason for discharging the Complainants was pretext for discrimination.

[Nuclear & Environmental Whistleblower Digest X P]
EVIDENCE; DOCUMENT EXAMINERS; HANDWRITING ANALYSIS; ADMISSIBILITY v. PROBATIVE VALUE

In ***Overall v. Tennessee Valley Authority***, 1999-ERA-25 (ALJ Mar. 16, 2004), several document examiners testified in regard to retaliatory and harassing handwritten and typed notes directed at the Complainant. Complainant's attorney sought a ruling that the Respondent's experts "should be limited in their testimony to observations of similarities and differences between known documents and questioned documents." The ALJ found persuasive authority to the effect that the fact that document examination has not been standardized is not necessarily a bar to the admissibility of such expert testimony -- questions about reliability go to weight of the evidence, not admissibility. The ALJ, however, found that the expert handwriting and typewriter testimony was "inconclusive and does not show that [the Complainant] or a TVA employee or a TVA supervisor authored the harassing notes on record."

[Nuclear & Environmental Whistleblower Digest XI A 2 a]
CAUSATION; EVIDENCE THAT COMPLAINANT'S POOR COMMUNICATIONS AND TEAMWORK SKILLS CAUSED DEFICIENT RATING RATHER THAN PROTECTED ACTIVITY; "PROVOCATION" DOCTRINE DID NOT APPLY WHERE COMPLAINANT'S LANGUAGE WAS NOT IMPLUSIVE BUT DELIBERATE

In ***Smalls v. South Carolina Electric & Gas***, ARB No. 01-078, ALJ No. 2000-ERA-27 (ARB Feb. 27, 2004), the ARB found overwhelming evidence that the Complainant received a deficient rating on a performance evaluation because his communications and teamwork skills were not satisfactory, and the record established that pursuit of ERA-protected safety-related issues did not contribute to the rating. The Board also found that the "employee provocation" doctrine did not apply to excuse the Complainant's objectionable conduct where the Complainant did not engage in impulsive, uncalculated behavior, but instead deliberately and unnecessarily relied on abrasive language and a confrontational approach. *See Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-37, slip op. at 9-15 and cases there cited (ARB Dec. 31, 2002).

[Nuclear & Environmental Whistleblower Digest XI C 2 b]
PRETEXT NOT ESTABLISHED

In ***Pafford v. Duke Energy Corp.***, ARB No. 02-104, ALJ No. 2001-ERA-28 (ARB Jan. 30, 2004), an accidental electrical fire and small explosion occurred at one of

Respondent's facilities, and following an investigation Complainants were discharged on the ground that they made false and misleading statements about their role in the accident. Complainants contended that Respondent actually fired them because they engaged in protected activity. Following a hearing the ALJ found that the investigation into the accident was "thorough and fair" and that Respondent's management sincerely and reasonably relied upon it in finding that Complainants had lied to and misled the investigators. The ARB found that the ALJ had thoroughly analyzed all of the evidence and correctly applied relevant law in finding that Complainants had failed to establish pretext.

[Nuclear & Environmental Whistleblower Digest XI D 2]

BURDEN OF PROOF; WHEN RESPONDENT'S CLEAR AND CONVINCING EVIDENCE BURDEN IS APPLICABLE

In ***Belt v. United States Enrichment Corp.***, ARB No. 02-117, ALJ No. 2001-ERA-19 (ARB Feb. 26, 2004), the ARB corrected the ALJ's erroneous statement of the employer's burden of proof in an ERA whistleblower case. The ALJ had indicated that once a complainant establishes a prima facie case, the respondent "must establish by clear and convincing evidence that it took the unfavorable action for a legitimate, nondiscriminatory business reason, and that it was the same as it would have taken, in the absence of the employee's protected activity." The Board, however, stated that "[o]nce a complainant establishes a prima facie case of discrimination, the respondent needs only to 'articulate some legitimate, nondiscriminatory reason' to 'discharge [its] burden of proof' at this stage of the litigation. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973)." The Board continued:

> The employer's clear and convincing evidence burden is in the nature of an affirmative defense and arises only when the complainant has proven, by a preponderance of the evidence, that the employer discriminated, at least in part, because of protected activity. *See Kester v. Carolina Power and Light Co.,* ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 8 (ARB Sept. 30, 2003). The ALJ here appears to have confused the Secretary of Labor's gatekeeping, investigative duties with her adjudicative role. *Compare* 42 U.S.C.A. § 5851 (b)(3)(B) (If, after filing the complaint but before the hearing, an ERA complainant makes a "prima facie" case that his protected activity contributed to the unfavorable personnel action, the Secretary shall not investigate the complaint "if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of [protected activity].") *with* 42 U.S.C.A. § 5851 (b)(3)(D)(In the adjudicatory phase of the litigation, if the complainant demonstrates a violation of the ERA, the Secretary may nevertheless not grant relief "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [protected activity]." *See also Kester,* slip op. at 5-6.

Slip op. at n.2.

[Nuclear & Environmental Whistleblower Digest XI D 2]
DUAL MOTIVE ANALYSIS; TRIGGER BY DIRECT OR CIRCUMSTANTIAL EVIDENCE

In ***Pafford v. Duke Energy Corp.***, ARB No. 02-104, ALJ No. 2001-ERA-28 (ARB Jan. 30, 2004), the ALJ erred in stating: "Where the [ERA] complainant produces direct evidence of discrimination, and the employer does not effectively rebut this evidence, the employer can avoid liability only by showing by clear and convincing evidence that it would have taken the same action in the absence of protected activity." Rather, the ARB has held that "to trigger dual motive analysis, the ERA 'requires only that the complainant prove by a preponderance of sufficient evidence, *direct or circumstantial*, that the protected activity contributed to the employer's decision.' *Kester v. Carolina Power and Light Co.,* ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. n. 19 (ARB Sept. 30, 2003) (emphasis added). *Cf. Desert Palace Inc. v. Costa,* 123 S. Ct. 2148 (2003) (Title VII plaintiff not required to present direct evidence of discrimination in order to obtain a mixed-motive [dual motive] jury instruction)."

[Nuclear & Environmental Whistleblower Digest XIII C]
HOSTILE WORK ENVIRONMENT; COMPLAINANT'S INABILITY TO ESTABLISH THAT RESPONDENT'S MANAGEMENT WAS RESPONSIBILE FOR ANONYMOUS HARASSMENT; EVIDENCE THAT RESPONDENT TOOK PROMPT AND APPROPRIATE CORRECTIVE ACTION

In ***Overall v. Tennessee Valley Authority***, 1999-ERA-25 (ALJ Mar. 16, 2004), the Complainant was reinstated following successful whistleblower litigation before DOL. Subsequently, the Complainant filed a new whistleblower complaint alleging, *inter alia*, that he was subjected to a hostile work environment upon his reinstatement. Following a four week hearing, the ALJ thoroughly analyzed the events that the Complainant proffered as showing hostility. The ALJ found that 11 incidents -- such as observations of suspicious vehicles, aggressive traffic encounters, and anonymous non-specific phone calls -- had not been proven to be harassing events in retaliation for protected activity. The ALJ, however, found that 12 other incidents -- such as telephone calls in which a whistle was blown or whistleblowing activity expressly mentioned, a note referencing Karen Silkwood, other notes, and a fake bomb placed in the Complainant's vehicle -- were established to be in retaliation for his protected activity. Citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 at 23, the ALJ analyzed the elements of a hostile work environment claim, and found that the Complainant had established that the conduct was frequent and severe, threatened physical harm, unreasonably interfered with his work performance, and would have detrimentally affected a reasonable person in the Complainant's position. However, the ALJ found that 11 of the 12 incidents found to be harassing were anonymous, with the Complainant unable to offer any evidence that the incidents were perpetrated by or for TVA superiors, and therefore insufficient to support *respondeat superior* liability. The 12th incident was an occasion when a supervisor stated "we're here as engineers to not make up problems but [to] find them and correct them." The found that although the statement could have been related to the Complainant's protected activities, it was mild in nature and did not reach the kind of foul language or mean behavior which the case law indicates constitutes severe or pervasive behavior incident to a hostile work environment. The ALJ also found insufficient evidence to establish Complainant's claim that he had been monitored.

The ALJ also found that the Respondent took prompt and appropriate corrective action that was reasonably calculated to end the harassment, even though the identity of the harasser was never established.

[Nuclear & Environmental Whistleblower Digest XIV A 1, XIV B 2 and XIV B 4 i]
EMPLOYER-EMPLOYEE; OWNER OF CONTRACT FIRM NOT A COVERED "EMPLOYEE"

In ***Demski v. Indiana Michigan Power Co.***, ARB No. 02-084, ALJ No. 2001-ERA-36 (ARB Apr. 9, 2004), the Complainant was the president and sole shareholder of a company that supplied contract labor for power generating plants, and had several contracts to supply workers for Respondent's Cook nuclear plant. Under the express terms of the contracts, the Complainant's company was defined as not an agent or employee of the Respondent. The Complainant alleged that the Respondent unlawfully terminated the contracts because she had reported safety concerns to Respondent's management and the NRC. The ARB found that two of the essential elements of a whistleblower claim under the ERA are that the complainant must be an employee and the respondent must be an employer. The ARB found that the undisputed facts of the case established that the Complainant was a contractor, and an employer, and not an employee of the Respondent or her company, and therefore she was not entitled to relief under the whistleblower provision of the ERA.

[Nuclear & Environmental Whistleblower Digest XX E]
SOVEREIGN IMMUNITY; TVA FOUND TO HAVE EXPRESSLY WAIVED

In ***Overall v. Tennessee Valley Authority***, 1999-ERA-25 (ALJ Mar. 16, 2004), TVA filed a motion to dismiss based on the argument that sovereign immunity had not been waived under ERA, 42 U.S.C. § 5851(b). The ALJ analyzed the applicable law, and found that "TVA expressly waived its sovereign immunity through the 'sue and be sued' clause contained in its enabling statute and that TVA has expressly consented to be sued for monetary damages pursuant to § 5851."

ENVIRONMENTAL CASES

[Nuclear & Environmental Whistleblower Digest II B 1 b]
AMENDMENT OF COMPLAINT BASED ON COMPLAINANT'S TESTIMONY ABOUT POST-COMPLAINT ACTIVITIES; MERELY PROBING COMPLAINANT'S EVIDENCE IS NOT EQUIVALENT TO TRIAL BY CONSENT

In ***Sasse v. Office of the U.S. Attorney, USDOJ***, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004), the ALJ erred when he sua sponte amended the whistleblower complaint to treat Complainant's testimony about post-complaint activities as admissible evidence on a theory of continuing violations. The testimony was about a suspension, which was a discrete act that was not actionable if not timely complained of. The Board held that the limitations period for filing a whistleblower complaint on the suspension had already expired.

The Complainant contended before the ARB that the amendment was proper because the suspension issue was tried by mutual consent. The Board found that "it is one thing to probe evidence about post-complaint activities for whatever light they might shed on the complaint's reasoning and credibility. It is another thing entirely to agree to treat this evidence as raising a new and independent claim for relief." USDOL/OALJ Reporter at 30 [PDF] (citations omitted). Moreover, the Board agreed with DOJ that the ALJ's recommended decision was the first notice it received of a claim based on the suspension.

[Nuclear & Environmental Whistleblower Digest II B 2]

FAILURE TO ALLEGE A VIOLATION OF A WHISTLEBLOWER PROTECTION DOES NOT ESTABLISH LACK OF JURISDICTION, ONLY LACK OF MERIT TO THE COMPLAINT

In ***Saporito v. USDOL***, ARB No. 03-063, ALJ No. 2003-CAA-9 (ARB Mar. 31, 2004), the ALJ had dismissed the complaint because the Respondent was not the Complainant's employer. The ALJ had found therefore that she did not have jurisdiction to consider the complaint. On review the ARB agreed with the ALJ that the complaint should be dismissed because of the Complainant's failure to establish an employer-employee relationship with the Respondent, but noted that this was not a matter of lack of jurisdiction, citing *Sasse v. United States Dep't of Justice*, ARB No. 99-053, ALJ No. 1998-CAA-7, slip op. at 3-4 (ARB Aug. 31, 2000). In *Sasse*, the ARB had clarified that the even if DOL ultimately finds that a complaint is lacking in an essential element, such a finding does not divest DOL of subject matter jurisdiction to hear and decide the case.

[Nuclear & Environmental Whistleblower Digest II B 2]

COMPLAINT; DEGREE OF SPECIFICITY REQUIRED TO ESTABLISH DOL JURISDICTION

In ***Santamaria v. U.S. Environmental Protection Agency***, 2004-ERA-6 (ALJ Feb. 24, 2004), the Complainant was a Coordinator of Minority Business Enterprises and Women Business Enterprises for the EPA. His complaint alleged that he was being pressured to approve "questionable, false flag Minority Business Enterprises" and that concerns he had voiced regarding EPA contracting constituted protected activity. Following a deposition of the Complainant, EPA moved for summary decision based on a number of grounds, the essence of which were the Complainant had failed to plead a violation of environmental whistleblower protection law, and that his alleged protected activity did not implicate any violation of environmental protection laws, even if true.

The ALJ, citing *Greene v. U.S. Environmental Protection Agency*, 2002-SWD-1 (ALJ Feb. 1, 2003), found that a complainant must allege a complaint with sufficient specificity to establish jurisdiction. *Greene*, 2002-SWD-1 had in turn cited MSPB decisions addressing principles of specificity in pleadings to the effect that vague allegations of wrongdoing regarding broad imprecise matters are not sufficient to establish subject matter jurisdiction over a whistleblower complaint.

In the instant complaint, Complainant failed, despite repeated opportunities in his deposition and in response to the Respondent's motion for summary decision, to

explain with any specificity the connection between his complaints and complaints related to health and safety concerns stemming from the alleged violation of environmental statutes named in the complaint. Thus, the ALJ granted the Respondent's motion for summary decision.

[Editor's note: *Santamaria* was erroneously docketed as an "ERA" case. The statutes involved, however, were all environmental.]

[Nuclear & Environmental Whistleblower Digest IV B 3]
TIMELINESS OF COMPLAINT; WRONG FORUM GROUND FOR EQUITABLE TOLLING; ABSENCE OF WRITTEN COMPLAINT

In ***Stapleton v. Harris Teeter, Inc.***, 2004-CAA-3 (ALJ Mar. 3, 2004), the ALJ recommended against invocation of equitable tolling where the only timely contact the Complainant made was a telephone call to either the North Carolina Department of Labor or the EPA, with no filing of any form of written complaint. The only evidence of a written complaint was a filing with OSHA 14 days beyond the limitations period.

[Nuclear & Environmental Whistleblower Digest V C 2]
EMPLOYER; OSHA

In ***Saporito v. USDOL***, ARB No. 03-063, ALJ No. 2003-CAA-9 (ARB Mar. 31, 2004), the Complainant alleged that OSHA violated several environmental whistleblower statutes because it did not complete a mandated investigation within 30 days and did not properly investigate that complaint. The ARB found that the Complainant, having failed to establish that OSHA was his employer, did not establish that OSHA was a covered employer. Thus, the complaint was dismissed.

[Nuclear & Environmental Whistleblower Digest IX B 2]
TIMELINESS OF PETITION FOR ARB REVIEW

The time period for requesting ARB review at 29 C.F.R. § 24.1(b)(2003) is an internal procedural rule adopted to expedite administrative resolution of cases. It is within the ARB's discretion, under proper circumstances, to accept an untimely filed petition for review under principles of equitable tolling. Complainant bears the burden of justifying the application of equitable tolling principles. Where Complainant's only argument was that her receipt of the ALJ's decision was delayed "due to complications associated with USPS forwarding of mail and delivery of it to her by the management at her new address" the ARB found that Complainant failed to demonstrate an extraordinary event that precluded timely filing. The ARB observed that the ALJ's decision had also been served on her counsel, and that there was no assertion that he did not timely receive the decision, and no explanation offered as to why he did not timely file the petition for review. The Board observed that although the Complainant was not personally responsible for the failure of her attorney to make a timely filing, she was accountable for the acts and omissions of her attorney. ***Gass v. U.S. Department of Energy***, ARB No. 03-035, ALJ No. 2002-CAA-2 (ARB Jan. 14, 2004).

[Nuclear & Environmental Whistleblower Digest IX C]
MOTION TO CONSOLIDATE: MOTION IS MOOT ONCE BOTH CASES ARE PENDING BEFORE THE ARB

In ***Erickson v. U.S. Environmental Protection Agency***, ARB No. 03-011, ALJ No. 1999-CAA-2 (ARB Jan. 29, 2004), after the ALJ had issued a recommended decision, Complainant and Complainant in another whistleblower case against EPA renewed a motion for consolidation. The presiding ALJ orally denied the motion, finding that only the OALJ headquarters was in a position to order consolidation in cases proceeding before two different ALJs. Subsequently the Associate Chief ALJ denied the motion to consolidate, and Complainant and the other Complainant filed a "protective petition for review" of the Associate Chief ALJ's order. Thereafter, a recommended decision was issued in the other whistleblower's case. The ARB ruled that because both ALJs had concluded their adjudications of the respective cases and issued recommended decisions, the motion to consolidate was moot.

[Nuclear & Environmental Whistleblower Digest IX M 2]
ATTORNEY QUALIFICATION PROCEEDING

See ***In re Slavin***, 2004-MIS-2 and 2004-STA-12 (ALJ Mar. 31, 2004), casenoted in the STAA Digest II M regarding the procedures for conducting a 29 C.F.R. § 18.34(g) hearing to determine the qualifications of an attorney.

[Nuclear & Environmental Whistleblower Digest XII C 3 and XII C 4]
PROTECTED ACTIVITY; REPORT OF PAINT OVERSPRAY INTO AMBIENT AIR; COMPLAINANT'S MOTIVE FOR MAKING REPORT NOT RELEVANT

In ***Smith v. Western Sales & Testing***, ARB No. 02-080, 2001-CAA-17 (ARB Mar. 31, 2004), the Complainant's primary motive for lodging complaints about the Respondent's painting operation was that paint overspray was damaging his vehicle. Nonetheless, the Complainant's complaint included concerns about paint fumes released into the ambient air, which the ARB concluded was an action to carry out the purposes of the CAA. The Board noted that it was well established that a whistleblower's motives need not be concern for the environment; rather, the relevant issue is whether the complainant's belief that the respondent is violating the environmental laws was reasonable. The ARB disagreed with the ALJ that the Complainant was required to establish that the release of pollution was adequate to trigger a violation of the CAA. The ARB also noted that pro se pleading should be construed liberally.

[Nuclear & Environmental Whistleblower Digest XII D 13]
PROTECTED ACTIVITY; ALTHOUGH PROSECUTOR'S WORK PROSECUTING ENVIRONMENTAL CRIMES IS NOT PROTECTED ACTIVITY PER SE, BOARD LEAVES OPEN POSSIBILITY THAT SUCH ACTIVITY COULD BE CONSIDERED SUCH

In ***Sasse v. Office of the U.S. Attorney, USDOJ***, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004), the ALJ erred in relying on decisional law under the whistleblower protection provision of the Civil Service Reform Act, 5 U.S.C.A. § 2302(b)(8)(A) (West 1996) in determining whether an Assistant U.S. Attorney's (AUSA) work as a prosecutor was protected activity. The ARB concluded that the

environmental whistleblower protection provisions are significantly broader in scope than the CSRA provision. The ARB disagreed with the Complainant's proposition that work prosecuting environmental crimes is protected activity per se, and that his management's disagreements on case prosecution should be deemed actionable interference. As addressed in another section of the decision, the ARB determined that it would not review the prosecutorial decisions of a AUSA's supervisors, and therefore the Complainant's claims could not be predicated on his employment status alone (although this was not wholesale immunity from charges that DOJ took discriminatory acts because the AUSA was engaged in statutorily protected activities). The Board declined to draw a fixed line between protected and unprotected acts in the case because the whistleblower's complaint failed for a variety of other reasons. Thus, the Board assumed, without deciding, that Complainant's work on environmental crimes was protected activity.

[Nuclear & Environmental Whistleblower Digest XIII B 17]
ADVERSE EMPLOYMENT ACTION; RATING OF "EXCELLENT" RATHER THAN "OUTSTANDING"

In ***Sasse v. Office of the U.S. Attorney, USDOJ***, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004), Complainant, an Assistant United States Attorney (AUSA), argued that performance evaluations rating certain of his work as "excellent" rather than "outstanding" resulted from his being held to higher performance standards than other AUSAs because of his environmental crimes work. The ARB observed that a downgraded personnel evaluation may constitute an adverse action, but that it had "not had occasion to determine whether an excellent rather than outstanding on an element of a performance appraisal which does not affect the overall performance appraisal rating is a material adverse action" particularly where the Complainant suffered no economic loss or opportunities for advancement as a result. The Board found that because the Complainant's allegation that he was held to a different and harsher performance standard rested entirely on his own uncorroborated and vague testimony, he had not carried his burden of proof and persuasion on the issue of adverse employment action. In other words, the Complainant's "vague impressions of office practices [were] insufficient to support a finding of disparate treatment." The Board also found that the DOJ had proved that the performance appraisals were based on the quality of the Complainant's work rather than discriminatory animus.

[Nuclear & Environmental Whistleblower Digest XIII B 18]
ADVERSE EMPLOYMENT ACTION; COMPLAINANT'S ULTIMATUM

In ***Smith v. Western Sales & Testing***, ARB No. 02-080, 2001-CAA-17 (ARB Mar. 31, 2004), the ARB found that the Respondent's sending the Complainant on paid leave for three months as a "cooling off" period was in retaliation for protected activity. Later, the Complainant engaged in discussions with the Respondent about the terms of his return to work. The testimony was conflicting, but the ARB, relying on the ALJ's demeanor based credibility determinations, found that the evidence showed that the Complainant presented an ultimatum at the meeting setting conditions for his return that were unacceptable to the Respondent. The Respondent's interpretation of the ultimatum as a decision by the Complainant not to return to work, therefore was found not to constitute adverse employment action.

[Nuclear & Environmental Whistleblower Digest XIII C]

HOSTILE WORK ENVIRONMENT; GENERAL PRINCIPLES; HEATED WORK ATMOSPHERE INHERENT IN NATURE OF JOB

In ***Sasse v. Office of the U.S. Attorney, USDOJ***, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004), the ARB reviewed the law on a hostile work environment claim. The Board wrote:

> Our cases draw heavily on the body of hostile work environment law that developed under the Civil Rights Act of 1964. *E.g., Morgan,* 536 U.S. 116; *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 754 (1998). "A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party therefore must file a charge within [the number of days allowed by statute] of the date of the act or lose the ability to recover for it." *Morgan*, 536 U.S. at 110. Discrete adverse employment actions have tangible effects such as "termination, failure to promote, denial of transfer, or refusal to hire." *Id.* 536 U.S. at 114.
>
> A hostile work environment "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* 536 U.S. at 115. Discriminatory jokes, comments and epithets may create a hostile working environment. *Id.* 536 U.S. at 120. Behavior that strikes fear in the employee for his or her personal safety may create a hostile working environment. *Robinson v. Sappington*, 351 F.3d 317, 330 (7th Cir. 2003). Some gray area exists between the two categories of conduct. However, the essential difference between conduct that amounts to discrete adverse employment action and conduct that amounts to a hostile work environment is that the former has an immediate and tangible effect on the employee's income or employment prospects while the latter does not. Hostile work environment conduct affects the employee's psyche first, and his earning power or prospects only secondarily. *Cf. Morgan, supra.*
>
> To prevail on a hostile work environment claim, the complainant must establish that the conduct complained of was extremely serious or serious and pervasive. *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993); *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986). Discourtesy or rudeness should not be confused with harassment, nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing actionable. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). Under this theory of recovery, a complainant is required to prove that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Jenkins*, elec. op. at 42; *Williams v. Mason & Hanger*

> *Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14 *et al*., elec. op. at 13 (ARB Nov. 13, 2002); *Berkman v. U.S. Coast Guard Academy,* ARB No. 98-056, ALJ Nos. 97-CAA-2, -9, elec. op. at 16-17, 21-22 (ARB Feb. 29, 2000); *Freels v. Lockheed Martin Energy Systems,* ARB No. 95-110, ALJ Nos. 94-ERA-6, 95-CAA-2, elec. op. at 13 (Sec'y Dec. 4, 1996); *Varnadore v. Oak Ridge Nat'l Lab.,* Nos. 92-CAA-2, -5; 93-CAA-1, elec. op. at 90-101 (Sec'y Jan. 26, 1996). Circumstances germane to gauging a work environment include "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Berkman*, slip op. at 16. A respondent is liable for the harassing conduct of a complainant's coworkers or supervisors if the employer knew, or in the exercise of reasonable care should have known of the harassment and failed to take prompt remedial action. *Williams*, slip op. at 55; *Varnadore,* slip op. at 75-78.

In ***Sasse***, the Complainant was an Assistant United States Attorney who alleged that DOJ took adverse employment actions against him and created a hostile working environment because of his prosecution of environmental crimes. As evidence, he alleged that his supervisor made life unbearable for him by harassing and demeaning him, citing several examples of alleged poor demeanor by the supervisor. The ARB agreed, however, with the ALJ's finding:

> The nature of the interactions described by Complainant regarding prosecution decisions are to be expected and are found to be a normal part of the give and take expected in [a prosecutor's] office. When forceful individuals have differing opinions, tempers are bound to flare. In such an atmosphere arguments are likely to occur and it can be expected that language may at times be significantly less than polite.

The Board found implausible the Complainant's attribution of the supervisor's alleged hostility to environmental enforcement to the fact that the supervisor had once worked for a chemical company. The Board also took into account that the Complainant's testimony about the supervisor's treatment of him was not collaborated whereas other witnesses' testimony indicated that the supervisor was not abusive nor threatening toward employees.

[Editor's note: *See also* ***Belt v. United States Enrichment Corp.***, ARB No. 02-117, ALJ No. 2001-ERA-19 (ARB Feb. 26, 2004) (ordinary tribulations of the workplace -- such as sporadic use of abusive language, joking about protected status or activity, occasional teasing -- are not actionable).]

[Nuclear & Environmental Whistleblower Digest XIV B 2]

EMPLOYER; TO BE A COVERED EMPLOYER, A SHOWING OF CONTROL OVER THE EMPLOYMENT IS REQUIRED

In ***Lewis v. Synagro Technologies, Inc.***, ARB No. 02-072, ALJ Nos. 2002-CAA-12 and 14 (ARB Feb. 27, 2004), the Complainant was an EPA employee working at a state university under an Intergovernmental Personnel Act agreement, who also engaged in outside employment as an expert witness and writer regarding the

adverse effects of land-applied biosolids or sludge sewage. The Complainant participated as an expert witness for the plaintiffs in a private tort suit filed against one of the Respondents, Synagro, a company whose business includes land application of biosolids as fertilizer. The other Respondent was a non-profit organization, whose mission included providing educational information to the public regarding the use of biosolids. The Complainant alleged that Synagro's CEO contacted the EPA and falsely accused the Complainant of receiving payment for his expert opinion testimony in the private tort suit, and that another Synagro employee falsely represented to the person who wanted to engage the Complainant as an expert witness that Complainant had an article refused by a professional journal and had improperly received payment for his expert testimony. The Complainant also alleged that the non-profit organization contacted EPA and falsely alleged that the Complainant received payment for the expert opinion, that his research was flawed and that that he had engaged in research misconduct. The issue on appeal was whether the Respondents and named officers of the Respondents are covered employers under the applicable whistleblower laws.

The SDWA, CAA and TSCA provide that no "employer" may discharge or discriminate against an employee. The ARB held that because the Complainant had not shown that the Respondents control or controlled the Complainant's employment, they were not covered employers. The Complainant argued on appeal that there is liability because the Respondents interfered with his employment. The ARB, however, found that "control over employment is essential to be an 'employer.'" In regard to individuals named as Respondents, the ARB held that they were not employers for the same "control" reason, as well as prior ARB decisions holding that an employee is not an "employer" under the comparable whistleblower protection provision of the ERA.

The FWPCA, SWDA and CERCLA provide that no "person" may fire or discriminate against an employee, or "cause" such. The ARB held, however, that:

> An examination of the whistleblower provisions of the FWPCA, SWDA and CERCLA in their entirety, their legislative history, and the Secretary's implementing regulations, establishes that the "person" referred to in the pertinent sections of these statutes must have an employment relationship with the complainant or act in the capacity of an employer.

The ARB also held that the Respondents were not liable under the FWPCA, SWDA and CERCLA because the Complainant failed to show that they controlled the terms, conditions, or privileges of his employment.

[Nuclear & Environmental Whistleblower Digest XVI A]

NO SHOWING OF DAMAGES WHERE COMPLAINANT WAS PLACED ON PAID LEAVE; COMPLAINT DISMISSED

In ***Smith v. Western Sales & Testing***, ARB No. 02-080, 2001-CAA-17 (ARB Mar. 31, 2004), the ARB found that the Respondent's sending the Complainant on paid leave for three months as a "cooling off" period was in retaliation for protected activity. The Complainant testified that it was stressful to be on leave, but did not

present specific evidence as to damages, nor did he request such damages. Accordingly, the ARB dismissed the complaint.

[Nuclear & Environmental Whistleblower Digest XX C 3]
FULL FAITH AND CREDIT; COLLATERAL ESTOPPEL

In ***Willy v. The Coastal Corp.***, ARB No. 97-107, ALJ No. 1985-CAA-1 (ARB Feb. 27, 2004), the Complainant had pursued a state court action for retaliatory discharge, which was dismissed on the ground that Texas law prevented the Complainant, who was an attorney, from revealing confidential communications of a client (the Respondent). The ARB, applying collateral estoppel analysis to determine whether full faith and credit must be given to the Texas decision, concluded that because the issue of an attorney's authority to disclose client confidences and secrets would be determined by federal common law before the ARB, the issues before the Texas court and the ARB were not identical, the ARB was not barred by collateral estoppel from reaching an independent conclusion on the use of privileged materials in the Complainant's federal whistleblower case.

[Nuclear & Environmental Whistleblower Digest XX E]
STATE SOVEREIGN IMMUNITY ENJOINS AN ENVIRONMENTAL WHISTLEBLOWER ADJUDICATION WHERE OSHA DOES NOT PARTICIPATE AS A PARTY, BUT DOES NOT ENJOIN AN OSHA INVESTIGATION OR AN ADJUDICATION WHERE OSHA DOES PARTICIPATE AS A PARTY

In ***Connecticut Dept. of Environmental Protection v. OSHA***, 356 F.3d 226 (2d Cir. 2004), the Court of Appeals affirmed in part and reversed in part a district court's injunction enjoining OSHA on state sovereign immunity grounds from investigating, hearing, or adjudicating a whistleblower complaint filed by a state employee against a state agency under several environmental whistleblower laws. The court affirmed the injunction insofar as it enjoined an adjudication before an ALJ where OSHA does not participate as a party, but held that the injunction swept too broadly in enjoining OSHA from conducting an investigation and from conducting an administrative adjudication in which it participates as a party. The court wrote that "Connecticut's sovereign immunity does not bar OSHA from intervening as a party in a case originally brought by a private citizen against a nonconsenting state agency."

[Nuclear & Environmental Whistleblower Digest XX E]
STATE SOVEREIGN IMMUNITY; TOO LATE FOR OSHA TO INTERVENE ONCE THE CASE IS BEFORE THE ARB

In ***State of Rhode Island v. United States***, 301 F.Supp.2d 151 (D.R.I. 2004) (case below 1998-SWD-3), the court held that the intervention of the Secretary to Labor [i.e., OSHA] removes the state sovereign immunity bar of agency adjudication of a case brought by a private citizen against a nonconsenting state "only if it occurs at or before the ALJ stage. Intervention at the ARB stage is too little and too late." The court therefore granted the State's motion to enforce the court's earlier injunction in regard to any further proceedings before the ARB in the Complainant's case. However, the court denied the motion to enforce to the extent that it sought to enjoin the Secretary from intervening at or before the ALJ stage.

[Nuclear & Environmental Whistleblower Digest XX F]

IMMUNITY; NON-REVIEWABILITY OF ACTIONS BASED ON PROSECUTORIAL DISCRETION; IMMUNITY LIMITED TO PROSECUTORIAL FUNCTIONS AND DOES NOT INCLUDE ADMINISTRATIVE FUNCTIONS

In ***Sasse v. Office of the U.S. Attorney, USDOJ***, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004), Complainant, an Assistant United States Attorney (AUSA), filed a complaint against his supervisors, the United States Attorney and the Executive Office for United States Attorneys (EOUSA) alleging that they took adverse employment actions against him and created a hostile work environment because of the Complainant's prosecution of environmental crimes. As evidence of hostility toward prosecution of environmental crimes, the Complainant cited two instances in which a supervisor opposed appeals from district court decisions, and an instant in which the supervisor declined to prosecute.

The ARB noted that a prosecutor is absolutely immune from suit for the exercise of prosecutorial discretion, subject to Constitutional constraints. In regard to DOL administered whistleblower laws, the Board wrote:

> We need not decide whether it is the Constitution or the doctrine itself that forbids an interpretation of the whistleblower provisions permitting review of prosecutors' decisions to appeal or to seek indictment. We conclude instead that prosecutorial discretion occupies such a prominent place in American jurisprudence that Congress would have been explicit had it intended to abrogate prosecutorial discretion in the whistleblower provisions. *See Forrester v. White*, 484 U.S. 219, 225 (1988) (the Court "has not been quick to find that federal legislation was meant to diminish the traditional common-law protections extended to the judicial process"); *Nixon v. Fitzgerald*, 457 U.S. 731, 746 (1982) (Abrogation of executive, legislative and juridical immunities must be express, because the public interest is best served by such vital decision makers if they can exercise their functions with independence and without fear of personal consequences).

The Board then turned to the scope of prosecutorial immunity. Reviewing the applicable law, the Board determined that "a distinction can and should be drawn between the prosecutor's function as advocate in the judicial process and the prosecutor's function as an employer and administrator – despite the fact that the latter significantly affects the former." The Board rejected an argument proffered by OSHA that prosecutorial discretion bars the Complainant's complaint in its entirety, and agreed with DOJ's positions "that the deliberative process involving questions whether to appeal or to indict are unreviewable exercises of prosecutorial discretion." The Board found, however, that DOJ's actions in applying performance standards, assigning support staff to AUSAs, and affording opportunities for training and teaching were not so "intimately associated with the judicial phase of the criminal process" as to be unreviewable.

[Nuclear & Environmental Whistleblower Digest XX G]
WAIVER OF ATTORNEY-CLIENT PRIVILEGE

In ***Willy v. The Coastal Corp.***, ARB No. 97-107, ALJ No. 1985-CAA-1 (ARB Feb. 27, 2004), the Complainant's case was grounded in evidence relating to a memorandum he had produced for a client concerning an internal environmental audit of the client's facilities. In the memorandum the Complainant had concluded that the client was liable for violations of federal environmental statutes. The Complainant's conclusions were severely criticized, and the Complainant alleged that his later discharge was based on the reaction to this memorandum. The case had a long, involved procedural history in which both the presiding ALJ and the Secretary of Labor had ruled the memorandum admissible as evidence. Throughout the proceedings, however, the Respondent assiduously protected its attorney-client privilege relating to the memo. On appeal before the ARB, the Complainant argued that the Respondent waived the privilege when it made the quality of his advice an issue in the firing. Noting that "[u]nder the 'at issue' or implied waiver principle, a party may waive the privilege by asserting claims or defenses that put his attorney's advice in issue in the litigation," (citations omitted) the Board nonetheless found that the Respondent had not raised the issue of the Complainant's competence as an attorney in drafting the memo as an affirmative defense in the proceeding. The Board found that rather than the Complainant's work as an attorney, the Respondent's defense was predicated on its perception of the Complainant as an employee -- "in particular his lying about having a conversation with [a state agency]." The Board found that the Complainant's allegation that the Respondent waived the privilege by supplying a copy of the memo to the Florida Department of Environment Regulation not to be supported by the evidence of record, and that even if it had, the transmission was of a later version of the memo -- not the one proposed by the Complainant on which attorney-client privilege was not waived.

[Nuclear & Environmental Whistleblower Digest XX G]
ATTORNEY-CLIENT PRIVILEGE; CRIME-FRAUD AND SELF-DEFENSE EXCEPTIONS; SELF-DEFENSE EXCEPTION IS ONLY AVAILABE AS A SHIELD AND NOT AS A SWORD

In ***Willy v. The Coastal Corp.***, ARB No. 97-107, ALJ No. 1985-CAA-1 (ARB Feb. 27, 2004), the ARB reconsidered an earlier ruling by a former Secretary of Labor on the admissibility of a document over which the Respondent claimed attorney-client privilege and on which the Complainant, an attorney, relied to support his environmental whistleblower case. Under Federal Rule of Evidence 503, as interpreted by the Supreme Court Standard 503(b), communications between attorney and client are protected by the attorney-client privilege when engaged in for the purpose of soliciting and/or providing legal opinions and advice. An exception to this privilege is that privileged communications are not protected from disclosure if they are meant to further future or ongoing criminal, fraudulent or other unlawful conduct. A second exception to this privilege is the attorney is permitted to disclose otherwise privileged communications to the extent reasonably necessary to defend against a charge of wrongful conduct. The Board noted that "The 'self-defense' exception therefore is unique to and 'aris[es] out of the lawyer-client relationship,' rather than some other or additional relationship in which the lawyer may be involved, such as employee-employer. The 'self-defense' exception cannot be used

offensively -- rather, the exception is "a shield, not a sword." Citing WEINSTEIN'S FEDERAL EVIDENCE § 503.33 (Matthew Bender 2d ed.).

Applying these principles to the circumstances of the ***Willy*** case, the ARB found that the "crime-fraud" exception was not applicable as the Complainant had not shown that the Respondent was engaged in ongoing crime, fraud or misconduct relating to federal environmental laws, or that his advice was sought to further such violations.

The ARB found that the "self-defense" exception was not applicable because the Complainant was seeking to use it offensively rather than defensively.

The ARB, however, carefully noted that its ruling was "confined to 'client confidences' (information protected under the attorney-client privilege) and does not necessarily exclude 'client secrets' (other information gained in the professional relationship)." The Board took note of several decisions permitting former in-house counsel to advance affirmative federal claims against their employers in their individual capacity so long as the attorney-client privilege was not violated.

In the instant case, the Complainant's case was dependent on privileged evidence, and without it the record was left only with the Respondent's evidence that the Complainant was terminated for a legitimate, non-discriminatory reason. Thus, the ARB dismissed the complaint.

[Nuclear & Environmental Whistleblower Digest XXI C]

LAW OF THE CASE; ARB MAY RECONSIDER ORDERS; PREJUDICE TO PARTY AGAINST WHOM RECONSIDERATION DISAVANTAGES RELATES TO NOTICE OF THE INTENT TO RECONSIDER, NOT TO HARM RESULTING FROM CORRECTION OF EARLIER RULING

In ***Willy v. The Coastal Corp.***, ARB No. 97-107, ALJ No. 1985-CAA-1 (ARB Feb. 27, 2004), the ARB held that the "law of the case doctrine" did not prevent it from reconsidering prior DOL orders, including a decision of a prior Secretary of Labor, where necessary to correct clear error, and a manifest injustice, before issuing a final decision of the DOL. The ARB observed that it had previously reconsidered and reversed its prior ruling in other cases. The Board also observed that a final decision had not yet been issued in the case, that a Texas court judgment very similar to the issue to be reconsidered by the ARB was a significant intervening event, and, as discussed elsewhere in the decision, the original ruling was erroneous. The Board held that its decision not to adhere to a prior ruling did not prejudice the Complainant within the meaning of the law of the case doctrine -- prejudice in this context does not mean harm resulting from the failure to adhere to the prior decision, but rather lack of sufficient notice that the prior ruling is not deemed controlling. Since the Complainant was notified in ARB briefing notices that the ARB would be reconsidering the issue, there was no prejudice.

STAA CASES

[STAA Whistleblower Digest II M]
ATTORNEY QUALIFICATION PROCEEDING

In ***In re Slavin***, 2004-MIS-2 and 2004-STA-12 (ALJ Mar. 31, 2004), the Associate Chief ALJ conducted a 29 C.F.R. § 18.34(g) hearing to determine the qualifications of the Complainant's counsel based on his history of disqualifications, sanctions and admonishments before the Associate Chief ALJ, other ALJs, and other tribunals. Based on the procedure described by the concurring opinion in *In re Slavin*, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), the Associate Chief ALJ issued a "Notice of Judicial Inquiry" which set out in specific detail prior judicial rulings on which OALJ took official notice under 29 C.F.R. § 18.45 and on which OALJ proposed to disqualify the attorney from appearing before OALJ. The attorney did not identify in response any issue of fact on which an evidence taking hearing was required. Accordingly the Associate Chief ALJ decided the matter based on the matters over which official notice had been taken and the attorney's arguments in response to the Notice. The attorney's essential defense was that he was being sanctioned for First Amendment protected speech as an outspoken critic of the Department of Labor. The Associate Chief ALJ, however, found that such a claim was a misrepresentation -- that the attorney was being sanctioned for his disruptive actions and malfeasance during in-court proceedings where his First Amendment's rights are subject to his ethical obligations as an attorney. Moreover, the judge observed that much of the attorney's misconduct, such as neglecting appellate briefing requirements and deadlines, was not even arguably protected First Amendment speech. Based on the long history of misconduct and the failure of lesser sanctions to moderate the attorney's behavior, among other factors, the Associate Chief ALJ imposed on the attorney a five year disbarment from appearing in any matter before DOL OALJ.

[STAA Whistleblower Digest II M]
ATTORNEY DISQUALIFICATION PROCEDURE; RECUSAL

In ***In re Slavin***, 2004-MIS-2 and 2004-STA-12 (ALJ Mar. 31, 2004), the Associate Chief ALJ gave notice that he would be conducting a Judicial Inquiry pursuant to 29 C.F.R. § 18.34(g) to determine the qualifications of the Complainant's counsel. The Complainant and his attorney filed a motion requesting that the Associate Chief ALJ recuse himself "*sua sponte,*" arguing essentially that the judge would be called as a witness to testify as to his own actions and had a conflict of interest as the instigator of the Judicial Inquiry. The motion was denied because (1) innuendo that the presiding ALJ has an improper motive for conducting a section 18.34(g) hearing was insufficient to establish grounds for recusal, (2) the request that the judge recuse himself "sua sponte" made it ambiguous as to whether the motion was a request or merely a suggestion, and (3) the nature of a section 18.34(g)(3) hearing is in the form of a judicial inquiry rather than an adversarial proceeding and the judge is not acting as a prosecuting "party" as in a typical adjudicatory proceeding.

[STAA Whistleblower Digest II M]
ATTORNEY DISQUALIFICATION PROCEDURE; WHETHER ATTORNEY CAN CONDUCT DISCOVERY AGAINST ALJ WHO INSTITUTED THE PROCEDURE

In ***In re Slavin***, 2004-MIS-2 and 2004-STA-12 (ALJ Mar. 31, 2004), the Associate Chief ALJ gave notice that he would be conducting a Judicial Inquiry pursuant to 29 C.F.R. § 18.34(g) to determine the qualifications of the Complainant's counsel. The Complainant and his attorney thereafter filed a motion requesting to take the videotaped depositions of the Associate Chief ALJ, the Chief ALJ and an OALJ staff attorney. The motion was denied because it did not state the relevancy of the requested depositions. Moreover, the judge also rejected the supposition that OALJ becomes a "party" against whom discovery may be had if section 18.34(g)(3) is invoked, citing the concurring opinion in *In re Slavin*, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003). The judge observed that if this was not the rule "an attorney could block any disciplinary proceeding by the simple expedient of naming as a witness the judge who observed the misconduct and instituted a section 18.34(g)(3) proceeding." (citations omitted).

[STAA Whistleblower Digest II M]
ATTORNEY DISQUALIFICATION PROCEDURE; GOVERNING RULES

In ***In re Slavin***, 2004-MIS-2 and 2004-STA-12 (ALJ Mar. 31, 2004), the Associate Chief ALJ conducted a 29 C.F.R. § 18.34(g)(3) hearing to determine the qualifications of the Complainant's counsel, a member of the Tennessee bar. The judge noted that OALJ conducts hearings throughout the United States, and that attorneys appearing before OALJ are not required to be a member of the bar in the state in which the hearing is conducted. The ALJ determined that he would cite the ABA *Model Rules of Professional Conduct* in his decision on the section 18.34(g)(3) proceeding, citing in support the ABA rule at MRPC 85 and the corresponding Tennessee rule at TRPC 8.5, which both provide that in applying choice of law on disciplinary conduct, where the conduct is in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits govern, unless the rules of the tribunal provide otherwise. The ALJ noted that the MRPC and the TRPC did not differ significantly in regard to the conduct at issue except where specifically discussed in the decision. In assessing the appropriate sanction, the ALJ applied the ABA's *Standards for Lawyer Discipline and Disability Proceedings* (1992).

[STAA Whistleblower Digest II P]
SUMMARY DECISION v. FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

In ***Lane v. Roadway Express, Inc.***, ARB No. 03-006, ALJ No. 2002-STA-38 (ARB Feb. 27, 2004), the ARB indicated that a motion for dismissal of a whistleblower complaint for failure to state a claim upon which relief may be granted is governed by FRCP 12(b)(6). If a party submits evidence outside the pleadings in support of a motion to dismiss, the ARB would view the motion as a motion for summary decision under 29 C.F.R. § 18.40.

[STAA Whistleblower Digest III J]
FORMAL RULES OF EVIDENCE, HEARSAY RULE; APPLICATION TO STAA WHISTLEBLOWER HEARINGS

In ***Calmat Co. v. USDOL***, No. 02-73199 (9th Cir. Apr. 19, 2004) (case below ARB No. 99-114, ALJ No. 1999-STA-15), the 9th Circuit Court of Appeals stated:

> STAA administrative hearings are conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings. See 29 C.F.R. § 1978.106(a) (citing 29 C.F.R. § 18). Under these rules, which conform to the Federal Rules of Evidence, hearsay statements are inadmissible unless they are defined as non-hearsay or fall within an exception to the hearsay rule. 29 C.F.R. § 18.802.5/ "Hearsay" is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted by the out-of-court declarant. 29 C.F.R. § 18.801(c).
>
> _____
>
> 5/ During the hearing, the ALJ believed that formal rules of evidence do not apply to STAA hearings because they do not apply in administrative hearings for whistleblower complaints under other statutes. However, her decision states that she was "mindful to screen out objected to evidence admitted based on this error."

Slip op. at 5117. The Respondent contended that the ALJ improperly admitted and relied upon hearsay evidence. The court, however, found that much of the objected to testimony was not hearsay (mostly on the ground that the statements were not admitted to establish the truth of the matter asserted, but rather that the statements had been made), and that any hearsay admitted in error had not been prejudicial. The court also observed that prejudice from hearsay is less likely when an ALJ rather than a jury weighs evidence, that the ALJ had expressly stated that she had not relied on hearsay evidence omitted over the Respondent's objections, and that there was other corroborating evidence in the record to support the ALJ's finding of disparate treatment.

[Editor's note: *Compare Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, 1995-STA-34 (ARB June 11, 1997) (ARB ruling that ALJ had properly admitted hearsay testimony and rendered judgment on the weight it was due)]

[STAA Whistleblower Digest IV C 2 a]
PRETEXT; SUBSTANTIAL EVIDENCE TO SUPPORT ALJ AND ARB FINDINGS

In ***Calmat Co. v. USDOL***, No. 02-73199 (9th Cir. Apr. 19, 2004) (case below ARB No. 99-114, ALJ No. 1999-STA-15), the 9th Circuit Court of Appeals affirmed the ALJ's and ARB's holding that the Respondent's stated reason for suspending the Complainant without pay -- to investigate threats and harassment that the Complainant had allegedly made against a fellow employee -- were pretext for retaliation against the Complainant for raising the safety issue of excessive hours of work. The court found that the ARB's finding of pretext was supported by substantial

evidence, "including the timing and severity of [the Complainant's] suspension and evidence of disparate treatment." The court cited the ALJ's findings that the suspension occurred a few days after the Complainant voiced safety complaints; the fellow employee's complaint against the Complainant emerged during investigation of the Complainant's safety complaint; suspension without pay was unusually severe for a long-employee; the length of the suspension was beyond the criteria of the Respondent's progressive disciplinary standards; the Respondent treated complaints similar to the one lodged by the fellow employee less seriously. The ALJ also found the Respondent's primary witness not to be credible -- expressing reservations about the manner in which that witness had conducted the investigation of the Complainant.

[STAA Whistleblower Digest IV D 1]
MIXED-MOTIVE ANALYSIS; DIRECT EVIDENCE OF RETALIATION IS NOT A PREREQUISITE

In ***Calmat Co. v. USDOL***, No. 02-73199 (9th Cir. Apr. 19, 2004) (case below ARB No. 99-114, ALJ No. 1999-STA-15), the 9th Circuit Court of Appeals observed that the ARB erred when it rejected the ALJ's mixed-motive analysis insofar as it stated that direct evidence of retaliation is necessary to apply the mixed-motive framework. The court indicated that a STAA whistleblower complainant need not produce direct evidence of retaliation under either the pretext or mixed-motive framework.

[STAA Whistleblower Digest V B 1 a]
PROTECTED ACTIVITY; REFUSAL TO SUBMIT TO RANDOM DRUG TEST

In ***Bergman v. Schneider National***, 2004-STA-19 (ALJ Mar. 9, 2004), the ALJ recommended dismissal of a complaint that was based on the Complainant's refusal to submit to a random drug test under the employer's drug test policy. The ALJ recommended dismissal because the Complainant failed to establish that refusal to submit to a random drug test was protected activity under the STAA.

[STAA Whistleblower Digest V B 1 c i]
PROTECTED ACTIVITY; REFUSAL TO LOG OFF DUTY TIME IN CONTRAVENTION OF RESPONDENT'S POLICY

The Complainant alleged that he was discharged in violation of the STAA whistleblower provision for refusing to falsify his driver log books. Specifically, Complainant logged on-duty during his employer–mandated off-duty break periods. The ARB, however, agreed with the ALJ that the Complainant was not engaged in protected activity when he refused to comply with the Respondent's clearly articulated policy concerning the logging of off-duty time. Complainant failed to show that his discharge for claiming on-duty time during certain mail runs violated regulations for computing on-duty time for drivers under the federal motor carrier hours of service regulations at 49 C.F.R. § 395.2 (2001), and he accordingly was not fired in contravention of 49 U.S.C.A. § 31105(a)(l)(B)(i). The ALJ properly granted summary judgment pursuant to 29 C.F.R. § 18.40. ***Hardy v. Mail Contractors of America***, ARB No. 03-007, ALJ No. 2002-STA-22 (ARB Jan. 30, 2004).

[STAA Whistleblower Digest V B 2 c]
PROTECTED ACTIVITY; REFUSAL TO DRIVE INTO REGION IN WHICH SNIPER SHOOTING WERE OCCURING

In ***Cummings v. USA Truck, Inc.***, 2003-STA-47 (ALJ Jan. 9, 2004), the ALJ recommended dismissal of a complaint that was based on the Complainant's refusal to take a driving assignment that would have taken him through the Washington, DC area during a period of sniper shooting in that region. The complaint was not based on allegation that the Complainant was either asked to violate a commercial vehicle regulation nor an apprehension that his safety was at risk due to the unsafe condition of the vehicle. The ALJ found that the Complainant's apprehension that a sniper might be present on the route did not fall within the employee protections provided for in the STAA. The ALJ also found that, considering the millions of persons who went to work in the region at time, any allegation that the Complainant was exposed to an unreasonable risk of danger was unavailing.

[STAA Whistleblower Digest VI B 4]
ADVERSE EMPLOYMENT ACTION; FILING OF MOTION REQUESTING THAT COMPLAINANT AND HIS COUNSEL BE BARRED FROM MAKING EX PARTE COMMUNICATIONS NOT SHOWN TO BE ADVERSE EMPLOYMENT ACTION

In ***Howick v. Campbell-Ewald Co.***, 2004-STA-7 (ALJ Feb. 27, 2004), the ALJ recommended granting summary decision in favor of the Respondent where the Complainant's complaint was based on the Respondent's filing of a motion in a prior case before a different ALJ objecting to ex parte communications by the Complainant and his legal counsel and requesting therein a "gag order" during the pendency of the matter. The ALJ recommended dismissal because such a complaint does not include the necessary element of an adverse employment action. The ALJ wrote: "The available relief for inappropriate action by legal counsel in a legal proceeding is to request sanctioning of counsel by the court, not an independent cause of action under the STAA." *See also* ***Howick v. Campbell-Ewald Co.***, 2004-STA-7 (ALJ Feb. 5, 2004) (order to show cause citing recent ARB decision in *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003-STA-11 (Oct. 14, 2003) (Respondent's filing of request for protective order not shown to be adverse employment action; distinguishing *Connecticut Light & Power Co. v. USDOL*, 85 F.3d 89 (2d Cir. 1995), cited by Complainant because it involved gag orders in settlement agreements, and did not contain a holding that "gag orders" are illegal per se)).

[STAA Whistleblower Digest IX C]
ATTORNEY'S FEES; PARTIAL SUCCESS BEFORE ALJ; REDUCTION FOR WORK BEFORE ALJ IS NOT NECESSARILY APPLICABLE TO WORK BEFORE THE ARB

In ***Eash v. Roadway Express, Inc.***, ARB Nos. 02-008, 02-064, ALJ No. 2000-STA-47 (ARB Mar. 9, 2004), the ARB declined to follow the ALJ's formula for reducing attorney's fees awarded for work before the ALJ based on the fact that the Complainant's had only obtained partial success on the complaint. The Board found that it was not bound by the ALJ's determination when considering a petition for work done before the Board, and that the attorney had successfully defended on

appeal the portion of the ALJ's recommended decision that was in favor of the Complainant. The Board therefore awarded the entire amount sought.

[**Editor's note:** the ARB had previously affirmed the ALJ's reduction of fees and costs based on limited success of the Complainant's attorney before the ALJ in *Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, 02-064, ALJ No. 2000-STA-47 (ARB June 27, 2003)].

[STAA Whistleblower Digest X A 3]
SETTLEMENT BEFORE THE ALJ; ALJ SHOULD REVIEW, BUT THE ARB ISSUES THE FINAL DECISION AND ORDER

Where the parties in a STAA whistleblower case settle while the matter is pending before the ALJ, the ALJ appropriately reviews the agreement; however, the ARB "must, nevertheless, issue a final decision and order .... *Monore v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 00-STA-50 (ARB Sept. 26, 2001); *Cook v. Shaffer Trucking Inc.*, ARB No. 01-051, ALJ No. 00-STA-17 (ARB May 30, 2001)." ***Rhoades v. First Student, Inc.***, ARB No. 04-038, ALJ No. 2003-STA-41 (ARB Mar. 18, 2004). *To the same effect* ***Radle v. Panther Bus Service***, ARB No. 04-018, ALJ Nos. 2003-STA-19 and 20 (ARB Mar. 22, 2004); ***Ass't Sec'y & Bielicki v. Lu Transport, Inc.***, ARB No. 04-053, ALJ No. 2004-STA-11 (ARB Mar. 30, 2004).

[STAA Whistleblower Digest XI B 1]
DISMISSAL FOR CAUSE; ABANDONMENT

In ***Fish v. Raymond Cossette Trucking***, ARB No. 03-047, ALJ No. 1997-STA-32 (ARB Mar. 24, 2004), the ALJ had stayed the STAA whistleblower proceedings pending the outcome of the Respondent's bankruptcy proceeding. After the final bankruptcy report stated that the Respondent had no remaining assets, the ALJ issued an order to show cause why the case should not be dismissed. Neither party responded. On review, the ARB issued a briefing schedule to which neither party responded. The ARB therefore affirmed the ALJ's dismissal on the ground of abandonment.

T*o similar effect* ***Kruml v. Patriot Express***, ARB No. 03-015, ALJ No. 2002-STA-7 (ARB Feb. 25, 2004) (Complainant failed to respond to ALJ's order to show cause why the purchaser of the liquidated assets of the originally named Respondent was a proper party to the case, and failed to respond to the ARB's briefing schedule).

[STAA Whistleblower Digest XI B 1]
DISMISSAL FOR CAUSE; FAILURE TO ATTEND HEARING, FAILURE TO SHOW GOOD CAUSE FOR THAT FAILURE

In ***Farrar v. Roadway Express, Inc.***, ARB No. 03-031, ALJ No. 2001-STA-58 (ARB Mar. 30, 2004), the ARB affirmed the ALJ's dismissal of a STAA complaint where the Complainant failed to attend the hearing and failed to show cause for that failure.

[STAA Whistleblower Digest XIII A]
PRE-EMPTION; MATTER COVERED BY THE LMRA DOES NOT PRE-EMPT STAA WHISTLEBLOWER COMPLAINT

In ***Lane v. Roadway Express, Inc.***, ARB No. 03-006, ALJ No. 2002-STA-38 (ARB Feb. 27, 2004), the Respondent contended that consideration of the complaint as it related to waiting time pay was pre-empted by the Labor Management Relations Act. The ARB, however, held that the LMRA, which governs contractual labor disputes, does not preclude the Secretary of Labor from determining whether discrimination occurred and ordering appropriate relief under the STAA.

[STAA Whistleblower Digest XIII C]
GRIEVANCE ARBITRATION; ALJ PROPERLY ADMITTED RECORD FROM GRIEVANCE PROCEEDING INTO THE STAA RECORD, BUT ALSO PROPERLY DECLINED TO DEFER

In ***Calmat Co. v. USDOL***, No. 02-73199 (9th Cir. Apr. 19, 2004) (case below ARB No. 99-114, ALJ No. 1999-STA-15), the 9th Circuit Court of Appeals affirmed the ALJ's conclusion (and the ARB's affirmance of that conclusion) that she should not defer to CBA grievance arbitration proceeding because the legal issues in that proceeding differed significantly from, and did not address adequately all the factual issues important to, an STAA whistleblower proceeding. The court held that " [t]he Department of Labor's policy of deferring STAA claims to the outcome of an arbitration under a CBA only in narrow circumstances is consistent with the national policy favoring arbitration." *Id.* at 5123. *See* 29 C.F.R. § 1978.112(a)(3).

The court observed that the ALJ properly admitted and weighed as evidence the record from the arbitration, citing *Roadway Express v. Brock*, 830 F.2d 179, 180-82 (11th Cir. 1987).

[STAA Whistleblower Digest XIII D]
MOOTNESS DOCTRINE

In ***Lane v. Roadway Express, Inc.***, ARB No. 03-006, ALJ No. 2002-STA-38 (ARB Feb. 27, 2004), the ALJ recommended dismissal because the Respondent had removed the complained of warning letter from the Complainant's file, thereby rendering the complaint moot. The ARB, however, found that the ALJ had overlooked the fact that the complaint had contained two separate adverse actions -- discipline and lost wages -- and remanded for further proceedings. In regard to the mootness doctrine, the Board wrote:

> Under Article III of the Constitution, the jurisdiction of federal courts extends only to actual cases and controversies. A federal court may not adjudicate disputes that are moot. *McPherson v. Mich. High Sch. Athletic Ass'n, Inc*., 119 F.3d 453, 458 (6th Cir.1997) (en banc) (quotation omitted). Although administrative proceedings are not bound by the constitutional requirement of a "case or controversy," the Board has considered the relevant legal principles and case law developed under that doctrine in exercising its discretion to terminate a proceeding as moot. *See, e.g., United States Dep't of the Navy,* ARB No. 96-185 (ARB May 15, 1997); *see also Assistant Sec'y and Curless*

v. Thomas Sysco Food Servs., No. 91-STA-12, slip op. at 4-7, Sec'y, Sept. 3, 1991, *vacated on other grounds sub nom., Thomas Sysco Food Servs. v. Martin*, 983 F.2d 60 (6th Cir. 1993).

Mootness results "when events occur during the pendency of a litigation which render the court unable to grant the requested relief." *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986), citing *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911). Allegations become moot when a party "has already been made whole for damage it claims to have suffered." *Madyun v. Thompson,* 657 F.2d 868, 872 (7th Cir. 1981). The burden of demonstrating mootness rests on the party claiming mootness. *Ammex, Inc. v. Cox*, 351 F.3d 697, 705, (6th Cir. 2003), citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

SOX CASES

ADVERSE ACTION; BLACKLISTING; MERE EVIDENCE THAT COMPLAINANT WAS NOT HIRED INSUFFICIENT TO ESTABLISH CAUSE OF ACTION

In ***McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.***, 2003-SOX-23 (ALJ Jan. 16, 2004), the ALJ found that the continuing violation theory could not be invoked to establish a whistleblower complaint based on a blacklisting theory, where the Complainant's only evidence was that he had applied for work with several entities and not hired. In *McIntyre*, the Complainant's discharge had occurred prior to the effective date of the SOX whistleblower provision, and he was asserting the blacklisting claim in order to establish a claim that would not be barred as an impermissible retroactive application of the Sarbanes-Oxley Act. The ALJ observed that the Complainant, a stock broker, had introduced no evidence to tie any of the applications or subsequent refusals to hire with any protected activity or Complainant's U-5. A U-5 is a National Association of Securities Dealers' "Uniform Termination Notice." Complainant alleged that the U-5 listed false reasons for his discharge.

ADVERSE EMPLOYMENT ACTION; ACTION IS ADVERSE UNDER "WHISTLEBLOWER" LAWS IF THE ACTION IS LIKELY TO DETER PROTECTED DISCLOSURES

In his recommended decision in ***Halloum v. Intel Corp.***, 2003-SOX-7 (ALJ Mar. 4, 2004),the ALJ concluded that

> An employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures. A complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities. *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir.

2000).[18] *See also Daniel v. TIMCO Aviation Servs., Inc*, 2002-AIR-26 (ALJ June 11, 2003)

_____

[18] Title VII case law has traditionally guided the adjudication of whistle blower cases, including the determination of whether an employer discriminated against a protected employee. *See Daniel v. TIMCO Aviation Servs., Inc*, 2002-AIR-26 (ALJ June 11, 2003). Whistle blower statutes are meant to encourage workers to disclose illegal and questionable activities, so their tests for unfavorable employment action encompass more than the adverse economic actions Title VII plaintiffs must prove; any action that would reasonably discourage a worker from making disclosures qualifies here. *Daniel*, *slip op.* at 15.

In *Halloum*, the ALJ found that a Corrective Action Plan (CAP) imposed prior to the Complainant's protected activity was not unfavorable employment action under the SOX regulations, and that requiring him to meet the CAP goals later was also not unfavorable employment action. However, the ALJ also found that a later modification to the CAP that set up the Complainant for failure by assigning him unattainable tasks was an unfavorable employment action.

[Editor's note: *Compare* ***White v. Burlington Northern & Santa Fe Railway Co.***, 2004 Fed. App. 0101P (6th Cir. Apr. 14, 2004) (rejecting EEOC interpretation that "adverse employment action" in the context of a Title VII retaliation claim means "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity.")]

ADVERSE EMPLOYMENT ACTION; TANGIBLE JOB CONSEQUENCES MUST ACCOMPANY A NEGATIVE PERFORMANCE EVALUATION

In ***Dolan v. EMC Corp.***, 2004-SOX-1 (ALJ Mar. 24, 2004), the ALJ, in the course of considering the issue of whether the complaint was timely filed, ruled that although the Complainant had received a negative performance evaluation, he had not shown "that it resulted in a lower salary, directly jeopardized his job security, or caused any tangible job detriment." Citing ARB and Federal case law, the ALJ found that, in the absence of such a showing, the performance evaluation could not be considered an adverse employment action. Therefore, the Respondent's later refusal to remove the performance evaluation from the Complainant's file (the only discrete act within the limitations period for filing a SOX whistleblower complaint), was also not an adverse employment action, and therefore the Complainant failed to show that he had timely filed a complaint within 90 days of an adverse employment action.

AFTER DISCOVERED EVIDENCE; EVIDENCE OF WRONGDOING BY COMPLAINANT MAY IMPACT ON REMEDY, BUT NOT ON QUESTION OF WRONGFUL RETALIATION

In ***Halloum v. Intel Corp.***, 2003-SOX-7 (ALJ Mar. 4, 2004), the Respondent discovered while preparing for hearing that the Complainant made a misrepresentation in relation to moving expenses. The ALJ found that such could not have been a reason for the adverse employment action as it was only discovered

later. The ALJ wrote: "An employer's after-acquired evidence of wrongdoing that could have resulted in discharge does not bar an employee from prevailing in a retaliation case. *McKennon v. Nashville Publishing Co.*, 513 U.S. 352, 358 (1995). The relocation misrepresentation would have limited the remedy had Complainant prevailed. *Id.*; s*ee also O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760 (9th Cir. 1996)."

CAUSATION; DEFINITION OF CONTRIBUTING FACTOR; TEMPORAL PROXIMITY AS INFERENTIAL EVIDENCE

In ***Halloum v. Intel Corp.***, 2003-SOX-7 (ALJ Mar. 4, 2004), the ALJ, after finding that the Complainant had established protected activity, knowledge of that activity by the Respondent, and adverse employment action in the form of unreasonable modifications to a Corrective Action Plan (CAP), wrote:

> As the final element, Complainant must prove that his disclosures to the SEC and to Intel's CEO contributed to the decision to modify his CAP. 29 C.F.R. § 1980.109(a). In the context of similar whistle blower cases, a contributing factor includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (citations omitted) (defining "contributing factor" in the Whistleblower Protection Act for federal employees). A whistle blower need not prove his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in an adverse personnel action.
>
> An unfavorable personnel action taken shortly after a protected disclosure may lead the fact finder to infer that the disclosure contributed to the employer's action. 29 C.F.R. § 1980.104(b)(2). Judges have drawn inferences of causation when the adverse action happened as few as two days later, *Lederhaus v. Donald Paschen & Midwest Inspection Serv., Ltd.*, 1991-ERA-13 (Sec'y Oct. 26, 1992), to as much as about one year later. *Thomas v. Ariz. Pub. Serv. Co.*, 1989-ERA-19 (Sec'y Sept. 17, 1993). The causal connection may be severed by the passage of a significant amount of time, or by some legitimate intervening event. *Tracanna v. Arctic Slope Inspection Serv.*, 1997-WPC-1 (ARB July 31, 2001) (slip op. at 7-8).
>
> Employer imposed the CAP modifications on August 19, 2002, some five months after Complainant made his allegations to the SEC on March 14, 2002, two months after Intel assigned Steve Rodgers to investigate whether those allegations were true, and immediately upon Complainant's actual return to work. Callaghan, the author of the modifications, had learned of the charges Complainant made about him to Intel's CEO Barrett and to the SEC in May. I do not believe he could segregate this knowledge from other reasons for the modifications; it played some role in his decision to modify the CAP as he did. It was not the primary motivating factor, but it need not be for Complainant to establish this element of his case. More than just the timing, the unreasonable nature of the two new assignments also

> leads me to infer retaliation. Setting Complainant up to fail by adding unreasonable goals to his CAP carried a none-too-subtle message of management's displeasure that would make others think twice about disclosing suspicions of corporate wrongdoing to the government.

The ALJ then proceeded to analyze the case under the dual motive analysis.

See also ***Welch v. Cardinal Bankshares Corp.***, 2003-SOX-15 (ALJ Jan. 28, 2004) (citing *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) for the definition of "contributing factor").

CLEAR AND CONVINCING EVIDENCE BURDEN ON RESPONDENT; REFUSAL OF COMPLAINT TO MEET WITH AUDIT COMMITTEE INVESTIGATORS WITHOUT HIS PERSONAL ATTORNEY

In ***Welch v. Cardinal Bankshares Corp.***, 2003-SOX-15 (ALJ Jan. 28, 2004), the Respondent argued that the Complainant (who was the Respondent's Chief Financial Officer) was fired because he refused to meet with Audit Committee investigators (including the Respondent's outside counsel) without his personal attorney present to discuss various concerns the Complainant had raised about the Respondent's accounting practices. The Respondent contended that the no-attorney requirement was justified because the presence of the attorney would destroy the confidentiality of the meeting and prevent attorney-client privilege from attaching to communications at the meeting. The Respondent also contended that the presence of the attorney would have changed the meeting from a fact-finding investigation into an adversarial process oriented toward the Complainant's desire for a severance package. The ALJ, however, found that the purpose of the meeting was not to conduct a legitimate inquiry into the Complainant's concerns, but to create a situation where the Complainant would not attend the meeting thereby creating a justification for terminating his employment. The ALJ also held that the Respondent, under the exigent circumstances, had no reasonable expectation that the information to be discussed was confidential, making the attorney-client privilege inapplicable. Moreover, the ALJ concluded that, as an officer, the Complainant could have waived the privilege. The ALJ wrote:

> Welch, as Cardinal's CFO, was a corporate officer of Respondent. As such, he had a fiduciary duty to Cardinal and its shareholders to ensure, *inter alia*, that Respondent complied with all applicable laws and regulations governing the administration of financial institutions such as Cardinal, and to disclose any failure of Cardinal to do so. In furtherance of those duties, he raised a number of issues regarding various events which occurred at Cardinal during the Summer and early Fall of 2002, which events he reasonably believed constituted violations of Federal law. Each of the issues raised by Welch concerned matters under the direct auspices of the CFO and involved a variety of documents and information to which he had legitimate access.
>
> Clearly, the disclosure of perceived financial improprieties is in the best interests of a corporation's shareholders so they may ensure

> that the corporation's officers and directors are complying with, *inter alia*, their duties of due care, good faith, and loyalty. Furthermore, Sarbanes-Oxley was expressly enacted by Congress to foster the disclosure of corporate wrongdoing and to protect from retaliation those employees, officers, and directors who make such disclosures. When ordered by Moore to meet with Densmore and Larrowe to discuss the issues he had raised, Welch was clearly acting in furtherance of his fiduciary duty to disclose possible wrongdoing. Allowing him to have his own counsel present during the meeting would not only promote Welch's fulfillment of that duty, it would further the purposes of Sarbanes-Oxley by protecting Welch from retaliation for disclosing improprieties governed by the Act. As an officer of Cardinal, it thus was within his power to waive the attorney-client privilege consistent with his fiduciary duty to act in the best interests of Respondent. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. at 348-49.

COVERED EMPLOYER; AUTOMATIC EXEMPTION FROM REPORTING UNDER SECTION 15(d) WHERE SECURITIES ARE HELD BY FEWER THAN 300 PERSONS

The whistleblower protection provisions of the Sarbanes-Oxley Act cover only companies with securities registered under § 12 or companies required to file reports under § 15(d) of the Exchange Act. In ***Flake v. New World Pasta Co.***, ARB No. 03-126, ALJ No. 2003-SOX-18 (ARB Feb. 25, 2004), the parties agreed that New World was not subject to § 12 of the Securities Exchange Act, and the dispute was whether it was required to file reports under § 15(d). The parties agreed "that in 1999 New World registered securities pursuant to the Securities Act of 1933 and that at the beginning of each fiscal year thereafter New World's securities were held of record by fewer than 300 persons." Under § 15(d), the applicable reporting requirements are automatically suspended when a company's securities are held at the beginning of the fiscal year by fewer than 300 persons.

The Complainant contended that SEC rule 12h-3 applies, and that because New World had not filed "Form 15" as that rule dictates, the suspension from reporting requirements is invalid. New World countered that the Form 15 filing applies only to a company that becomes illegible for the suspension *during* a fiscal year, citing several SEC informal, non-binding interpretative statements in support. The ARB observed that the SEC had expressed this view (that the suspension goes into effect by operation of law and the failure to file Form 15 has no effect on the automatic suspension) not only in informal guidance, but also in notice and comment rulemaking. The ARB rejected Complainant's argument that the SOX whistleblower provision should be interpreted to include any publicly traded company, and found that no genuine issue of material fact existed as to whether New World was a covered employer under that law. Thus, it affirmed the ALJ's dismissal.

DUAL MOTIVE; CLEAR AND CONVINCING EVIDENCE BURDEN ON RESPONDENT; SECRET TAPING IN VIOLATION OF ESTABLISHED COMPANY POLICY

In ***Halloum v. Intel Corp.***, 2003-SOX-7 (ALJ Mar. 4, 2004), the ALJ concluded that the Complainant had established that protected activity was a contributing factor in the Respondent's decision to modify a Corrective Action Plan (CAP) to impose unreasonable assignments on the Complainant. Turning to dual motive analysis, the ALJ noted that the Respondent's burden was to prove by clear and convincing evidence that the CAP modifications would have been the same even if the Complainant had not engaged in the protected activity.

The Respondent presented evidence that it believed that the Complainant recorded conversations at work in violation of explicit company policy of which the Complainant was aware. The Respondent presented evidence that tape recording was anathematic to its corporate culture, which sought not to chill employee self-expression. The ALJ found that the Respondent's evidence on this point was consistent, undisputed, and provided clear and convincing evidence -- that it was within the Respondent's prerogative to enforce this policy by modifying the CAP as it did, even if it was a rather ham-fisted way of doing so.

In addition, the ALJ found that the Respondent provided clear and convincing evidence that it had removed the Complainant's supervisory responsibilities in the modified CAP based on the Complainant's attempt to coerce his staff to give only positive evaluations of his performance rather than on the basis of any whistleblowing activity. Finally, the ALJ found that the Respondent established that the Complainant was on his way out anyway, and that the protected activity was not a factor that brought matters to a tipping point. The ALJ noted that it was an open question whether an employer's policy against secret tape recording might allow an employee to escape discipline if the tape gave direct evidence of invidious discrimination, but that where is does not, a violation of company policy in this regard serves as a legitimate, non-discriminatory basis for discharge. *Deiters v. Home Depot USA, Inc*., 842 F.Supp. 1023 & n.2 (M.D. Tenn. 1993).

EMPLOYEE OF NON-PUBLICILY TRADED SUBSIDIARY OF PUBLICLY TRADED COMPANY

In ***Morefield v. Exelon Services, Inc.***, 2004-SOX-2 (ALJ Jan. 28, 2004), the Repondents argued that the Complainant was not protected by the SOX whistleblower provision because he was the employee of a relatively small subsidiary of a huge publicly traded company, and because the subsidiary is not publicly traded. The ALJ reviewed the context of enactment of the Sarbanes-Oxley Act and concluded that it was clear that Congress intended the term "employees of publicly traded companies" to include employees of subsidiaries. The ALJ wrote: "A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries. In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization."

The ALJ distinguished recent ALJ decisions in *Flake v. New World Pasta Co.*, 2003 SOX 18 (ALJ July 7, 2003) and *Powers v. Pinnacle Airlines, Inc.*, 2003 AIR 12 (ALJ Mar. 5, 2003). The ALJ found that *Flake* was not decided based on the issue of coverage of an employee of a subsidiary of a publicly traded company. He also found that *Pinnacle Airlines* was decided on the basis that no publicly traded company was named as a party respondent, whereas in the case *sub judice* the Complainant did name the publicly traded entity in the complaint. The ALJ respectfully disagreed with the ALJ in *Pinnacle Airlines* to the extent that dicta in that case suggested that employees of a subsidiary of a publicly traded company must "pierce a corporate veil" within their own chain of command before they are entitled to SOX whistleblower protection.

EVIDENCE; ADMISSIBILITY OF LETTER FROM SETTLEMENT NEGOTIATION WHEN USED IN ATTEMPT TO ESTABLISH TIMELY FILING OF COMPLAINT RATHER THAN TO PROVE LIABILITY OR DAMAGES

In ***Dolan v. EMC Corp.***, 2004-SOX-1 (ALJ Mar. 24, 2004), the Complainant proffered a letter from the Respondent's counsel in which Respondent refused to remove a negative performance evaluation in an attempt to show that an act of retaliation had occurred within the limitations period for filing a SOX whistleblower complaint. The letter was in response to a letter from Complainant's counsel asserting that the performance evaluation was false and defamatory and suggesting that the Respondent should settle the matter, *inter alia*. The Respondent argued that its letter was inadmissible under FRE 408 because it was made as part of settlement negotiations. The ALJ, however, found that the policy favoring exclusion of settlement documents was to prevent chilling of nonlitigious solutions to dispute, and that exclusion of such documents is not required where the evidence is offered for a purpose other than to prove liability or damages. Since in the instant case the letter was proffered to establish the final retaliatory act against the Complainant, it was admissible. The ALJ also found that was not, in fact, an offer of settlement or compromise.

PRETEXT; PROTECTED ACTIVITY AS CONTRIBUTING FACTOR TO ADVERSE EMPLOYMENT ACTION; ALLEGED INSUBORDINATION SET UP AS A PRETEXT TO DISCRIMINATION

In ***Welch v. Cardinal Bankshares Corp.***, 2003-SOX-15 (ALJ Jan. 28, 2004), the ALJ found that Respondent's argument that the Complainant (the Respondent's Chief Financial Officer) was suspended and later discharged solely because he refused to meet with outside auditors to discuss issues the Complainant had raised without a personal attorney present was not convincing. Rather, the ALJ found that the evidence established that the "investigation" of the Complainant's complaints was orchestrated by the President/CEO and Chairman, acting in concert with the outside auditors, in such a manner as to justify the Complainant's termination. Thus, the purported "insubordination" of refusing to appear without a personal attorney present was mere pretext.

PROTECTED ACTIVITY; BLOWING THE WHISTLE ON ALLEGEDLY IMPROPER MANIPULATION OF INTERNAL REPORTS; VIOLATION OF ACCOUNTING PRINCIPLES AND INADEQUACY OF INTERNAL CONTROLS AS RELATED TO FEDERAL LAWS RELATING TO FRAUD AGAINST STOCKHOLDERS; NO MINIMUM DOLLAR VALUE MATERIALITY REQUIREMENT

In ***Morefield v. Exelon Services, Inc.***, 2004-SOX-2 (ALJ Jan. 28, 2004), the Respondents contended that the complaint must be dismissed prior to hearing because the whistleblowing concerned alleged manipulations of financial information in internal reports, budgets and forecasts, and it is not a violation of any law for the management of a subsidiary to deceive the parent as long as the external financial reports and statements are not effected. The Respondents' argued that no third party was misled or defrauded and therefore no federal interest was implicated. The Respondents also noted that the questions raised by the Complainant only involved less than .0001% of the parent's revenues and therefore he had no reasonable basis for believing that his concerns were material. The Respondents also noted that the Complainant had not identified the law that the alleged manipulation would have violated. The ALJ found that dismissal was not warranted on these grounds prior to hearing, finding that there was no support for the proposition that manipulations must appear in an external report, and that SOX provides "ample latitude to include rules governing the application of accounting principles and the adequacy of internal accounting controls implemented by the publicly traded company in compliance with [federal rules and regulations 'relating to fraud against stockholders']." The ALJ also agreed with the Complainant that SOX places no minimum dollar value on the protected activity it covers.

PROTECTED ACTIVITY; REASONABLE BELIEF THAT REPORTED CONDUCT WAS ILLEGAL, EVEN WHERE INVESTIGATION LATER ESTABLISHED THAT IT WAS NOT

In ***Halloum v. Intel Corp.***, 2003-SOX-7 (ALJ Mar. 4, 2004), the Complainant told the SEC that he had been instructed to delay the payment of invoices to subsequent quarters to increase cash on Intel's balance sheet. Because of intense news coverage at the time of Enron's creative accounting, he believed that the instructions amounted to a fraud on Intel's investors. Subsequently, an internal investigation required by the SEC, and accepted by that agency after review, exonerated Intel. Nonetheless, the ALJ found that the Complainant believed that he had been asked to delay invoices (although he actually was working with receiving notices rather than invoices). Citing case law from other whistleblower cases adjudicated by DOL, the ALJ observed that "[a] belief that an activity was illegal may be reasonable even when subsequent investigation proves a complainant was entirely wrong. The accuracy or falsity of the allegations is immaterial; the plain language of the regulations only requires an objectively reasonable belief that shareholders were being defrauded to trigger the Act's protections." Slip op. at 15 (footnote omitted).

PROTECTED ACTIVITY; REASONABLE BELIEF THAT RESPONDENT VIOLATED THE LAW; FINANCIALS OVERSTATED INCOME; RESTRICTIONS ON ACCESS OF CFO TO EXTERNAL AUDITORS; UNTRAINED PERSONNEL MAKING JOURNAL ENTRIES

In ***Welch v. Cardinal Bankshares Corp.***, 2003-SOX-15 (ALJ Jan. 28, 2004), the ALJ concluded that under the SOX whistleblower provision, the "Complainant is not required to show the reported conduct actually constituted a violation of the law, but only that he reasonably believed Respondent violated one of the enumerated laws and regulations. . . . The standard for determining whether Complainant's belief is reasonable involves an objective assessment. *See, e.g., Minard v. Nerco Delamar Co.,* 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8." The ALJ found that the Complainant had raised five alleged protected activities, and upon analyzing the facts concluded that at least three of the five allegations were based on a reasonable belief that violations were being committed (the ALJ did not reach the last two allegations). First, the Complainant (Respondent's Chief Financial Officer) refused to sign the Respondent's third quarter certification because he believed that two journal entries appearing in the Respondent's financial statements totaling $195,000 overstated income by almost 14%. According to the Complainant, third quarter financial statements would be relied upon by investors, and in fact apparently were based on increases in stock prices after the third quarter report. The ALJ found the Respondent's arguments to the contrary unconvincing. Second, the Complainant alleged that his access to Respondent's external auditors was so restricted that he could not attest to the validity the Respondent's financials prepared by the auditors (the auditors instead communicated directly with the Respondent's President/CEO and Chairman). Again, the ALJ found that the Respondent's arguments to the contrary were not convincing. Finally, the ALJ found that the Complainant engaged in protected activity when he alleged that the Respondent had inadequate internal controls because too many individuals outside the finance department were making journal entries without the CFO's review or knowledge.

PROTECTED ACTIVITY; INTERNAL REPORT; NO REQUIREMENT THAT INFORMATION BE PROVIDED IN SUPPORT OF AN INVESTIGATION

In ***Getman v. Southwest Securities, Inc.***, 2003-SOX-8 (ALJ Feb. 2, 2004), the Respondent argued that the Complainant was not engaged in protected activity under the whistleblower provision of the SOX when she refused to change her rating of a stock because she did not provide information in support of an investigation. The ALJ, however, citing notes from the regulatory history of the SOX interim final rules interpreting protected activity to include both reporting violations *and* participating or assisting in a proceeding, found that "Complainant's refusal to change her rating, done in the presence of her managers, was an act of whistleblowing protected by the Act."

PROTECTED ACTIVITY; ANALYST'S REFUSAL TO CHANGE STOCK RATING; REFERENCE TO SEC REGULATIONS

In ***Getman v. Southwest Securities, Inc.***, 2003-SOX-8 (ALJ Feb. 2, 2004), the Complainant was a research analyst at a securities firm covering healthcare technology. At a review committee meeting, the Complainant declined to change her rating on a company from "accumulate" to a stronger "buy" rating. Although the

committee did not tell the Complainant to change her rating or tell her that they were displeased with the rating, the Complainant interpreted the questioning as pressuring her to provide a stronger rating. The Respondent stood to participate in a banking deal to raise capital for the company if the securities report was favorable. The Respondent contested whether such a meeting actually took place and argued that even if the meeting took place, the Complainant's case was grounded merely in her perception of being pressured. The ALJ found, however, that there was definitive evidence in the record showing that such a meeting had occurred, and concluded that the Complainant's theory that the Respondent had attempted to conceal the existence of the meeting showed a motive to hide a securities law violation.

The ALJ next considered whether the Complainant's actions were protected activity under the SOX whistleblower provision through reference to the "manipulative practices" provision of SEC regulation 17 C.F.R. 240.10-5. The ALJ wrote:

> These antifraud provisions are catchalls expressly designed to thwart misrepresentations in securities trading. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 859 (2d Cir. 1968) (en banc); *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 861 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1348 (2d Cir. 1998) (unpublished table decision). They are thus liberally construed to embrace a wide range of misconduct. *Softpoint*, 958 F. Supp. at 862. To prove a violation of these provisions, the party asserting that a violation has occurred must show: (1) that a misrepresented or omitted fact was made in an offer, attempt to induce a purchase or sale, or an actual purchase or sale of security; (2) that the misrepresented or omitted fact was "material"; and (3) that the respondent acted with the requisite "scienter." *Basic, Inc. v. Levinson*, 485 U.S. 224, 240 (1988); *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980). The jurisdictional requirements of the antifraud provisions are interpreted broadly and are satisfied by intrastate telephone calls and even very ancillary mailings. *Softpoint*, 958 F. Supp. at 865.7/
>
> ___
>
> 7/ The jurisdictional requirement of the Securities Act is satisfied here through Complainant's use on Respondent's behalf of the telephone system in carrying out the research necessary to prepare the Cholestech report.

Slip op. at 19 (one footnote omitted). The ALJ found the Respondent attempted to misrepresent the value of the stock because it attempted to rate it at a level higher than its own expert, the Complainant deemed accurate, based on a motive not grounded in the characteristics of the stock but it own interests in a potential banking deal. The ALJ found materiality because investors relied on the Respondent's ratings in making investment decisions. Finally, the ALJ found scienter based on evidence that the Respondent was seeking to enter into a banking deal that depended on a higher rating, and on evidence that the Respondent attempted to conceal the review committee meeting.

REMOVAL TO DISTRICT COURT; ORDER OF COURT DIRECTING ALJ TO DEMONSTRATE WHETHER DOL'S FAILURE TO ISSUE FINAL DECISION IN 180 DAYS WAS ATTRIBUTABLE TO THE COMPLAINANT'S BAD FAITH

In ***Corrada v. McDonald's Corp.***, 2004-SOX-7 (ALJ Jan. 23, 2004), the Complainant notified the ALJ that she intended to remove the case to Federal District Court and moved for a stay of the ALJ proceeding. The ALJ denied the stay pending assertion of jurisdiction by the District Court. Subsequently, a claim was filed in District Court. The District Court then faxed to the ALJ an order asserting jurisdiction and staying the DOL proceeding. In the order, the District Court ordered the ALJ to demonstrate whether the failure of DOL to issue a final decision within 180 days was due to the bad faith of the complainant. The ALJ noted no indication of bad faith on the part of the complainant, and found that since the District Court had asserted jurisdiction, DOL's role in the matter had terminated. Thus, the DOL proceeding was dismissed.

RETROACTIVE APPLICATION OF SOX WHISTLEBLOWER PROVISION NOT PERMITTED

In ***McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.***, 2003-SOX-23 (ALJ Jan. 16, 2004), the ALJ agreed with the ALJ decisions in *Gilmore v. Parametric Technology,* 2003-SOX-1 (ALJ Feb.6, 2003) and *Kunkler v. Global Futures & Forex, Ltd,* 2003-SOX-6 (ALJ Apr.24, 2003) in which it was determined that the whistleblower provision of the Sarbanes-Oxley Act could not be afforded retroactive application. See *Landgraf v. USI Film Products,* 511 U.S. 244 (1994) (strong presumption against retroactive application unless Congress manifested a clear intent to have the statute in question apply retroactively).

TIMELINESS OF APPELLATE BRIEF

Where Complainant failed to file a timely brief or motion for enlargement of the briefing schedule based on good cause, the ARB dismissed the complaint based on failure to prosecute. The Board observed that although the Complainant was not personally responsible for the failure of his attorney to make a timely filing, he was accountable for the acts and omissions of his attorney. ***Steffenhagen v. Securitas Sverige, AR***, ARB No. 03-139, ALJ No. 2003-SOX-24 (ARB Jan. 13, 2004).

To the same effect ***Gass v. Lockheed Martin Energy Systems, Inc.***, ARB No. 03-093, ALJ No. 2000-CAA-22 (ARB Jan. 29, 2004); ***Melendez v. Exxon Chemical Americas***, ARB No. 03-153, ALJ No. 1993-ERA-6 (ARB Mar. 30, 2004).

TIMELINESS OF COMPLAINT; DATE OF NOTICE OF DISCRIMINATORY DECISION COMMENCES TIME PERIOD FOR FILING COMPLAINT

In ***Flood v. Cedant Corp.***, 2004-SOX-16 (ALJ Feb. 23, 2004), the Complainant was notified by e-mail on June 12, 2003 that unless he found alternative employment with Respondent's business by June 23, 2003, his employment would be terminated on June 26, 2003. The Complainant replied to the e-mail. The notification was also sent to the Complainant by overnight delivery service. Before the ALJ, the Complainant contended that the time period for filing a SOX complaint commenced on June 26, 2003,the date of his termination; the Respondent contended that the

time period commenced on June 12, 2003. The ALJ, applying 29 C.F.R. § 1980.103(d), found that the period commenced when the Complainant received notice. The ALJ cited *Watson v. Eastman Kodak Co.*, 235 F.3d 851 (3d Cir. 2000).

TIMELY RAISED CLAIMS; OSHA INVESTIGATION DOES NOT ESTABLISH BOUNDARIES OF FACTUAL INQUIRY BEFORE ALJ

In ***Morefield v. Exelon Services, Inc.***, 2004-SOX-2 (ALJ Jan. 28, 2004), the Respondents contended that any "new claims" that Morefield failed to raise within 90 days of his termination and allegations which were not raised and investigated by OSHA are not properly subject to adjudication in the proceeding before the ALJ. The ALJ clarified that

> The violation . . . is not the whistleblower's protected conduct, it is the retaliatory action which it allegedly triggered. In this instance it was the termination, and, although there are exceptions not here pertinent, Morefield generally would not now be free to charge additional violations. In contrast, neither [a decision cited by the Respondent -- *Ford v. Northwest Airlines, Inc.*, 2002 AIR 21, at n.3 (ALJ Oct.18, 2002)] nor the statute require that every instance of protected activity be brought to OSHA's attention or that OSHA investigate every instance that is alleged in a complaint. The scope of an OSHA investigation does not establish boundaries of the factual inquiry permitted in the subsequent adjudication. After 90 days, new violations generally may not be raised, but the statute and the implementing regulations contemplate both discovery and a *de novo* hearing of the facts relating to both the protected activities and the reasons for the adverse action regardless of OSHA's findings. It involves no transgression of the "two tiered" scheme for handling whistleblower claims to adjudicate fully the circumstances of a timely filed complaint.

IMMIGRATION CASE

DEBARMENT AND CIVIL PENALTIES; IMPOSITION AGAINST VETERANS AFFAIRS MEDICAL CENTER AGAINST PUBLIC POLICY

In ***Talukdar v. U.S. Dept. of Veterans Affairs Medical & Regional Office Center, Fargo, ND***, 2002-LCA-25 (ALJ Apr. 12, 2004), the ALJ found that the Respondent violated the anti-discrimination provision of the H-1B labor condition application regulations when it discharged two physicians after they had cooperated with a DOL investigation into whether prevailing wages had been paid to H-1B workers. Although the ALJ ordered reinstatement, back pay, relocation expenses for one of the Complainants, and expungement of a retaliatory proficiency report in one of the Complainant's personnel files, she declined to impose civil penalties and debarment from participation in the H-1B LCA program where the Respondent was a VA medical center. The ALJ stated: "...I conclude that these remedies are inappropriate against this Respondent, a publicly funded veterans' medical center

with chronic budget struggles, which needs H-1B physicians to provide care for its patients."

REINSTATEMENT; FACILITY AT WHICH OFFER MUST BE MADE; REJECTION OF OFFER TERMINATES BACK PAY LIABILITY

In ***Talukdar v. U.S. Dept. of Veterans Affairs Medical & Regional Office Center, Fargo, ND***, 2002-LCA-25 (ALJ Apr. 12, 2004), two physician-Complainants indicated a preference not to be reinstated to the same facility at which the retaliatory conduct occurred. The ALJ, however, found that the Respondent could offer reinstatement at the same facility or another mutually agreeable facility. The ALJ noted that the Complainants were free to accept or reject the offer of reinstatement, albeit back pay would terminate as of the date of a rejection of a reinstatement offer.

RETALIATION FOR COOPERATION WITH H-1B PREVAILING WAGE INVESTIGATION; PROXIMITY OF PROTECTED ACTIVITY TO ADVERSE ACTION; BUDGETARY LIMITATIONS AS PRETEXT

In ***Talukdar v. U.S. Dept. of Veterans Affairs Medical & Regional Office Center, Fargo, ND***, 2002-LCA-25 (ALJ Apr. 12, 2004), the ALJ found that two physicians were fired from a Veterans Affairs medical center (VAMC) because they provided information to an investigator for the Department of Labor who performed an audit of VAMC's H-1B visa program in January 2001. Under the Immigration and Nationality Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the U.S. Department of Labor ("DOL") by filing a Labor Condition Application ("LCA). 8 U.S.C. § 1182(n). The DOL is responsible for investigating complaints that an employer has failed to comply with the terms of the LCA, or has failed to pay the appropriate wage rate. 8 U.S.C. § 1182(n)(2). Subsection (n)(2)(C)(iv) provides that it is a violation of the Act for an employer to discriminate against an employee who discloses information about or cooperates with an investigation of a violation of the Act's requirements. According to the regulatory history of the implementing regulations -- because the language and intent of this provision are similar to the employee protection provisions contained in the nuclear and environmental whistleblower statutes administered by DOL, the same analysis applies. 65 Fed. Reg. 80178 (2000); *see Administrator v. IHS Inc.*, 1993-ARN-1 (ALJ Mar. 18, 1996).

The two physician-Complainants involved were not H-1B workers themselves, but participated in advocacy on behalf of VAMC H-1B physicians in their leadership roles in the physicians' union. The ALJ found that although the H-1B advocacy extended over a period of time, the proximate events leading up to the Complainants' discharges transpired over a period of less than two months as the H-1B issue came to the forefront. The ALJ found that this proximity established a nexus between the protected activity and the adverse employment action. The ALJ found that the Respondent's proffered legitimate non-discriminatory reason -- budgetary problems -- was not credible and was a pretext for retaliation for the Complainants participation in the DOL H-1B investigation. The ALJ analyzed the Respondent's past practices vis-a-vis budgetary limitations and found that terminating the employment of physicians had never been the way in which such problems were addressed. The ALJ also rejected an additional suggestion that performance was an issue with one of

the Complainants where this reason was proffered after-the-fact, and where the negative performance appraisal was inconsistent with four previous appraisals and did not match or distorted the duties assigned.

PSI CASES

On April 5, 2004, OSHA published an Interim Final Rule stating ***Procedures for the Handling of Discrimination Complaints under Section 6 of the Pipeline Safety Improvement Act of 2002***, Interim Final Rule, 69 Fed. Reg. 17587 (Apr. 5, 2004). The regulations are similar to the regulations implementing AIR21, nuclear and environmental, and STAA whistleblower laws.

MISCELLANEOUS

ADVERSE EMPLOYMENT ACTION; REQUIREMENT OF A MATERIALLY ADVERSE CHANGE IN TERMS OF EMPLOYMENT

In a Title VII action, ***White v. Burlington Northern & Santa Fe Railway Co.***, 2004 Fed. App. 0101P (6th Cir. Apr. 14, 2004), the Sixth Circuit reviewed that circuit's law on the meaning of an "adverse employment action." The court stated that *Kocsis v. Multi-Care Management Inc.*, 97 F.3d 876 (6th Cir. 1996), is the seminal case in the 6th Circuit for defining adverse employment action. The court wrote:

> In *Kocsis v. Multi-Care Management Inc.*, this court considered the definition of adverse employment action in the context of a discrimination claim under the Americans with Disabilities Act. 97 F.3d 876, 885-87. Relying in part upon the Seventh Circuit's definition, this court held that a plaintiff claiming employment discrimination must show that she suffered "a materially adverse change in the terms of her employment." *Id.* at 885 (citing *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883 (7th Cir. 1989), which involved an age discrimination claim). A "mere inconvenience or an alteration of job responsibilities" or a "bruised ego" is not enough to constitute an adverse employment action. *Id.* at 886 (citing *Crady v. Liberty Nat'l Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993), and *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994)).
>
> Furthermore, according to *Kocsis*, "reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims." *Id.* at 885 (citing *Yates*, 819 F.2d at 638, which applied to "temporary" reassignments). A reassignment without salary or work hour changes, however, may be an adverse employment action if it constitutes a

> demotion evidenced by “a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.” *Id.* at 886 (citing *Crady*, 993 F.2d at 136).

In *White*, the Plaintiff and the EEOC as *amicus* argued that the court should revise its definition to adopt the EEOC interpretation that "adverse employment action" in the context of a Title VII retaliation claim means "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." The court, however, concluded that its definition accomplishes the purpose to Title VII's anti-retaliation provision while also balancing "the need to prevent lawsuits based on trivialities." The court therefore re-affirmed the definition developed in *Kocsis* and similar 6th Circuit decisions.

In considering whether a suspension without pay followed by reinstatement with back pay is an adverse employment action, however, the 6th Circuit rejected an earlier decision suggesting that it would follow the *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) "ultimate employment decision" rationale.